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In The

Supreme Court of the United States

1986 TERM

RICHARD J. MARINO, and JOSEPH R. ROSSI,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. WHETHER THE REQUIREMENT THAT RICO'S PREDICATE ACTS OF RACKETEERING BE CHARGEABLE UNDER STATE LAW NECESSITATES INCORPORATION OF NEW YORK'S RULE REQUIRING CORROBORATION OF ACCOMPLICE TESTIMONY?

2. WHETHER FED. R. OF EVID. 804(b)(1) PERMITS AN UNCONSTITUTIONAL LIMITATION ON A DEFENDANT'S RIGHT TO PRESENT EXCULPATORY EVIDENCE?

3. WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED WHEN A CO-DEFENDANT'S ATTORNEY IS REVEALED MID-TRIAL TO HAVE PREVIOUSLY REPRESENTED A KEY GOVERNMENT WITNESS AND THE DEFENDANT IS REFUSED THE RIGHT TO PRESENT THAT ATTORNEY AS A WITNESS IN HIS OWN BEHALF?

4. WHETHER FED. R. OF EVID. 801(d)(2)(E) DEMANDS A FINDING OF INDEPENDENT INDICIA OF RELIABILITY IN ORDER TO COMPORT WITH THE CONFRONTATION CLAUSE AND THIS COURT'S DECISION IN *U.S. V. INEDI*, 106 S.Ct. 1121?

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6. WHETHER THERE EXISTS A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DEFENDANT MAY BE SENTENCED CONSECUTIVELY FOR VIOLATIONS OF TITLE 18 U.S.C. §§ 1962(c) AND 1962(d)?

LIST OF PARTIES

The United States of America,

Appellee,

vs.

Donald J. Paone, Anthony M. Columbo, Joseph R. Rossi, a/k/a "The Hop," Thomas E Marotta, Richard J. Marino, Rene Piccaretto, Samuel J. Russotti, "Red",

Appellants.

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 782 F.2d 386, and is reprinted in the appendix hereto at page A-1.

A judgment of conviction was entered against petitioners Marino and Rossi on December 24, 1984, in the United States District Court for the Western District of New York after a jury trial conducted before the Hon. Thomas C. Platt, Jr.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Second Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1257(3).

Petitioners' convictions were affirmed by the Second Circuit Court of Appeals on February 5, 1986. A petition for rehearing en banc was timely filed and the request denied by the Second Circuit Court on March 24, 1986. This petition was timely filed within sixty (60) days of the order denying the petition for rehearing en banc.

STATUTES INVOLVED

AMENDMENT V

No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF EVIDENCE:

Rule 804: Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptons. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

18 U.S.C. §1961(1)(a)

"Racketeering activity" means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year.

NEW YORK STATE CRIMINAL PROCEDURE LAW

Section 190.65

Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

NEW YORK STATE CRIMINAL PROCEDURE LAW

Section 60.22

A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

STATEMENT OF THE CASE

In 1973, Vincent James Massaro, reputedly connected to a group of individuals involved in criminal activities including arson and insurance fraud, was murdered. His murder, it was claimed, was the result of his complaints about payment for his part in the arsons.

Two years later, in 1975, two informants facing state murder charges gave state and federal authorities information concerning their alleged knowledge of the Massaro murder along with additional information regarding related criminal activities.

Based upon this information, in 1976, a Monroe County Grand Jury returned an indictment against petitioner and others charging them with the murder of Massaro. While the state prosecuted the Massaro homicide, the Federal Government, in 1976, prosecuted the arson/insurance fraud claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). The RICO indictment charged petitioners and others with engaging in an enterprise involved in "acts of racketeering" alleged to have occurred from June 1, 1969, to August 31, 1973, all in violation of 18 U.S.C. §1961.

After a jury trial on the state indictment, petitioners and their co-defendants were convicted. However, this conviction was later vacated on motion of the Monroe County District Attorney based upon the fact that perjured testimony had been used to obtain the conviction. Petitioner and his co-defendants were tried and acquitted on the 1976 RICO indictment.

In November of 1982, a second RICO indictment was filed in the Western District of New York charging ten defendants, among them petitioners Marino and Rossi, with substantive participation in an enterprise allegedly conducted through a pattern of racketeering activity and extortion and conspiracy to participate in the affairs of such an enterprise.

The trial on this second RICO indictment commenced on September 17, 1984. The evidence adduced was presented largely through the testimony of alleged accomplices and co-conspirators of the defendants and concerned an enterprise allegedly involved in the extortion of various gambling clubs in the Rochester, New York area from September 19, 1977, until the date of the indictment (November 8, 1982). Significantly, however, the Government alleged one earlier predicate act substantially antedating 1977 — the November 23, 1973, murder of Vincent James Massaro.

Among the accomplices and co-conspirators whom the Government presented in its case-in-chief were such participants in the criminal acts as Angelo Monachino, Anthony Oliveri, Thomas Pelusio, Thomas Digulio, and Vincent Rallo. Each of these accomplices and co-conspirators testified that they were presently receiving, or had received, substantial consideration and benefits from the Government in exchange for their testimony. These benefits included federal and state immunity from prosecution for the activities testified to, prosecutorial and sentencing mitigation considerations for many other crimes committed by these witnesses and Government financial support and relocation in the Federal Witness Relocation Program for the witnesses and members of their families.

On October 30, 1984, the jury returned verdicts convicting petitioners Marino and Rossi, and six of their co-defendants and acquitting three others.

POINT I

THE REQUIREMENT THAT RICO'S PREDICATE ACTS OF RACKETEERING BE CHARGEABLE UNDER STATE LAW NECESSITATES INCORPORATION OF NEW YORK'S RULE REQUIRING CORROBORATION OF ACCOMPLICE TESTIMONY

The words of the instant statute prohibit racketeering activity which is defined *inter alia* as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year," 18 U.S.C. §1961(1)(a). It was appellant's position below that the "chargeable under State law" nomenclature necessitates reference to New York's statutory requirement that a defendant may neither be charged with a crime nor convicted of an offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense. *See, New York Criminal Procedure Law,* §190.65 and §60.22(1). Appellant posited that, given that mandate, he cannot be charged with racketeering activity under RICO in the absence of corroborative accomplice testimony. The argument was rejected by the Second Circuit which concluded that RICO meant merely to define, in a generic sense, the wrongful conduct which constitutes the predicate acts, not to incorporate various state procedural rules.

Petitioners believe that review of this ruling is appropriate, not only because of its significance to RICO prosecutions nationwide, but also because it would clarify the tenuous interplay between the RICO statute and this Court's ruling in *United States v. Nardello,* 393 U.S. 286, 89 S.Ct. 534 (1969) which has been relied upon by many of the lower courts as supporting a generic construct. However, this Court has never explicitly sanctioned that

reliance and petitioners believe it is misplaced. Resolution of the scope of the "chargeable" terminology would prove illuminating to prosecutors and defense alike.

In *Nardello,* it was ruled that, pursuant to 18 U.S.C. §1952, conduct which prohibits travel in interstate commerce with the intent to carry on "extortion" in violation of the laws of the state in which committed, applies to extortionate conduct classified as *blackmail* by the State of Pennsylvania. The Court reasoned that if the statutory language were not interpreted as referring to a generic description of conduct, the Travel Act would apply only to some states, depending upon the terminology used in their penal statutes, even though all of those states prohibited identical criminal activity.

The result of *Nardello,* therefore, was dictated by the Court's expressed wish to avoid a statutory interpretation that would allow limited prosecutions even though each state had the same legislative intent to squelch like criminal activity. That situation, of course, is not duplicated here and appellant seeks no ruling which would ignore legislative intent or compel a result equivalent to that sought to be avoided by the *Nardello* Court. Because the New York legislature has staunchly determined that neither conviction nor indictment can obtain unless accomplice testimony is corroborated (*See, People v. Nitzberg,* 289 N.Y. 523, 47 N.E.2d 37 [1943]; *People v. Berger,* 52 N.Y.2d 214, 437 N.Y.S.2d 272 [1981]), the appellant's interpretation of "chargeability" would merely give substance to that mandate. Should a state deem the corroboration requirement unnecessary to its penal code, then "chargeability" as applied to conduct committed in that state would not encompass the corroboration requirement.

The factors which influenced the *Nardello* decision, and which are not at issue here, are of particular note since it is that case which informs some of the more oft-cited Court of Appeals decisions regarding chargeability. For instance, in *United States v.*

Brown, 555 F.2d 407 (5th Cir. 1977) *cert. den'd*, 435 U.S. 904, 98 S.Ct. 1448 (1978) the Fifth Circuit relied on its earlier decision in *United States v. Revel*, 493 F.2d 1 (5th Cir. 1974), to rule that the terminology "chargeable under State law" was meant to define the conduct prohibited, not to incorporate the state statute of limitations or procedural rules. *Revel*, however, is predicated on *United States v. Nardello*. The section under consideration in Revel is 18 U.S.C. §1955 which provides for prosecution of illegal gambling businesses which are violative of the law of the state in which conducted. 18 U.S.C. §1955(b)(1). The Fifth Circuit found that the state statute of limitations was inapplicable since the gravaman of the indictment was a violation of federal law and thus, accordingly ruled that the state law language should be interpreted as referring only to the *conduct* prohibited by the state.

Revel is particularly pertinent to petitioners' argument since the Court's rejection of the applicability of the state statute of limitations was based, at least in part, on the bifurcated system of gambling offense prosecutions. Large-scale gambling operations only are within the purview of Section 1955 while small-time gambling rings are left to state control. Thus, concluded the Court, "[i]n view of the bifurcated system of enforcement, it seems reasonable to use federal standards in enforcing the Federal law" (*Id.* at 3).

Revel's realization that the decision whether to use federal or state law necessitates reference to underlying legislative determinations is one of great logical relevance to the matter at bar. Application of the federal statute of limitations in *Revel* did no disservice to the state system of values since the Federal Government had assumed primary responsibility for prosecution of large-scale gambling organizations. In this instance, to ignore New York's accomplice corroboration rule is to blatantly disregard New York's consistent and oft-expressed opinion that accomplice testimony is inherently suspect. *See, People v. Nitzberg, supra*, at 536

(1943). So sacred is that aspect of the law that the Legislature amended New York's practice to clarify and make explicit that an indictment cannot be returned if based upon uncorroborated accomplice testimony (See, *McKinney's Consolidated Cons. Laws of New York*, §190.65.) And, the New York Court of Appeals long ago ruled that an indictment founded upon illegal or insufficient evidence is not a "mere matter of procedure". See, *People v. Glen*, 173 N.Y. 395, 399-400 (1903). The accomplice corroboration rule of New York has been the subject of innumerable rulings by that State's highest court which has not veered from its insistence that the oath of an accomplice is of little intrinsic worth. In *People v. Berger, supra*, 52 N.Y.2d at 218, the Court wrote:

> "One who concedes his or her own guilt of a crime and testifies against another might often be doing so to curry favor with the authorities. Courts have thus exercised the utmost caution in dealing with accomplice testimony, especially when the testimony is exchanged for immunity or other favorable prosecutorial consideration..."

Thus, while it is true that the concept is embodied in the procedural law of New York State and goes beyond the conduct which comprises the Penal Law definition of any particular crime, it is also true that the rule incorporates substantive criminal law concepts which are, unlike a statute of limitation, for instance, crucial to the very guilt or innocence of the defendant. The purpose of a statute of limitation (the focal point of many of those Court of Appeals cases rejecting arguments similar to that made herein) is primarily to protect individuals from having to defend against charges in cases where the passage of time has obscured the essential facts. *See, generally, Toussie v. United States*, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860 (1970). This, then, is the essence of a procedural rule; in other words, one designed to achieve an orderly and systematic trial based on the timely and efficient presentation of facts. The corroboration rule does not partake of that desire to achieve an orderly procedure. Instead, it looks to the

guilt or innocence of the defendant and realizes that neither can be uncovered (solely) through the words of the participant turned informer.

The importance of the accomplice corroboration rule to the criminal law of New York cannot be underestimated and must be given the utmost regard where the interpretation of Section 1961 is involved. If Congress were not anxious to give all appropriate deference to the state system of prosecution and punishment, it would have made no reference to crimes "chargeable under State law" or indeed, punishable in the state by a one year period of imprisonment. To unwittingly limit the interpretation of "chargeability" is to ignore the fact, as did the Court below, that the accomplice corroboration rule has long-standing and substantive roots in New York.

This more substantive aspect of the corroboration requirement is further revealed by examination of CPL §190.65, which specifies that evidence to indict is not legally sufficient when corroboration that would be required to sustain a conviction for that offense is absent. There is no corresponding provision providing that a true bill cannot be returned if the statute of limitations has run. The latter is subject to a defense motion to dismiss but the prosecutor has no responsibility to establish the timeliness of the prosecution to a Grand Jury and failure to do so does not invalidate the indictment. *See, People v. Kohut*, 30 N.Y.2d 183, 188, 331 N.Y.S.2d 416, 420 (1972).

In tandem with those purposes to be served by respecting the suspicion with which New York regards the uncorroborated word of an accomplice is the fact that the statutes which various lower courts have cited as analogous, 18 U.S.C. §1952 (Travel Act) and §1955 (gambling offenses), use much broader language than does Section 1961. Both of those statutes prohibit specified conduct which is a violation of the law of the state. In contrast, 18 U.S.C. §1961(1)(a) speaks of the prosecution of enumerated crimes

"chargeable under State law and punishable by imprisonment for more than one year." That wording most certainly reflects an intent to consider as predicate offenses only those activities which the State considers serious enough to warrant incarceration for at least one year. The desire to take cognizance of how a state views the substantive allegation should also extend to analysis of the term "chargeability." "Chargeable under State law" is not the equivalent of the phrase, a "violation of State law" and it is entirely reasonable to suggest that the chargeability terminology is to be more specifically defined so that it might reflect the State's prosecutorial goals. Just as a predicate act cannot be punished under RICO if the state views it as too minor to merit less than a year in prison, so to, a predicate act should not be punishable if New York considers the accusation underpinning it to be inherently unreliable.

The wording of the statute, the significance of the long-standing accomplice corroboration rule in New York and the questionable applicability of the *Nardello* ruling to the interpretation of Section 1961 are all factors which, in conjunction, demand review by this Court with regard to the scope of the chargeability requirement. Petitioners thus ask the Court to grant certiorari on this issue.

POINT II

FED. R. OF EVID. 804(b)(1) PERMITS AN UNCONSTITUTIONAL LIMITATION ON A DEFENDANT'S RIGHT TO PRESENT EXCULPATORY EVIDENCE.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Not only is this right specifically guaranteed by the Sixth Amendment, it is also recognized as among

the minimum essentials of a fair trial, and, as such, a requisite element of a criminal defendant's Fifth Amendment right to due process. *Id.* at 294.

However, the ability to present witnesses is severely infringed by Federal Rule of Evidence 804 (b)(1) and its particular application in this action. Specifically, this petition draws into question the constitutionality of that portion of Rule 804 (b)(1) which prevents a criminal defendant from utilizing the prior sworn exculpatory testimony of an unavailable witness unless the prosecuting agency at the prior proceeding was identical to that body prosecuting the subsequent action.

The possibility that the statute, in view of that limitation, may not pass constitutional muster has been raised by two, recognized scholarly commentators. Weinstein's Evidence advises that:

> "Congress narrowed Rule 804(b)(1) so that the defendant against whom the testimony is now offered had to be the party in the prior proceeding. Another party, no matter how closely allied in interest or motive, will not do. Where, however, it is the defendant in a criminal suit who wishes to use the prior testimony, due process may require it to be admitted against the United States even though a state may have been the prosecuting agency in the prior case." 4 Weinstein's *Evidence* §804(b)(1)[06], page 804-98.

Similarly, McCormick on Evidence, notes:

> "The rule as enacted insists on identity of prosecution, which seemingly would bar defendant in a federal prosecution from introducing exculpatory testimony from a related state case given by a since deceased witness... exclusion of such evidence implicates due process considerations, and quite likely was not intended by the Congress." (Citing, *Chambers v. Mississippi*, 410 U.S. 284 [1973]). *McCormick on Evidence* §256, page 766 (3d Edition).

In the instant action, defense counsel sought to introduce the prior state trial testimony of an unavailable witness. This excul-

patory testimony specifically contradicted the testimony of one of the Government's primary witnesses. (Vol. 20 A.M., p. 6883).* Additionally, petitioners sought the introduction of a co-defendant's grand jury testimony elicited by the County District Attorney's office. The Government agreed that all of this testimony was exculpatory. (Vol. 20 A.M., pp. 6868, 6870). Nonetheless, the Court refused to admit these statements based upon Rule 804's "same party" limitation, a decision which violated petitioner's due process rights, as recognized by the legal scholars, and the correctness of which should now come under this Court's scrutiny.

The inclusion in Rule 804(b)(1) of the same party limitation was the result of the House Judiciary Committee's belief that "it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." House Committee on the Judiciary, Federal Rules of Evidence, H.R. Rep. No. 650, 93rd Cong, First Sess., p. 15 (1973). This concern of general unfairness cannot, however, be used to override the established due process rights of *defendants* to present witnesses on their own behalf. The question of unfairness to the prosecuting agency must give way to the constitutional considerations of the Fifth and Sixth Amendments.

This Court's position on the issue is necessary to direct the lower courts in this unchartered, but significant area. Petitioners ask, therefore, that certiorari be granted in order to direct attention to this problem of constitutional magnitude.

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* References to (Vol.) are to the transcripts filed in the District Court.

POINT III

A DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED WHEN A CO-DEFENDANT'S ATTORNEY IS REVEALED MID-TRIAL TO HAVE PREVIOUSLY REPRESENTED A KEY GOVERNMENT WITNESS AND THE DEFENDANT IS REFUSED THE RIGHT TO PRESENT THAT ATTORNEY AS A WITNESS IN HIS OWN BEHALF.

A. *The spill-over prejudice under the Sixth Amendment.*

The Court's attention is directed to the Petition for Certiorari filed in this case by petitioner Thomas E. Marotta. The issue raised below is inextricably tied to the Court's consideration of petitioner Marotta's claim that the irreconcilable conflict of interest arising between him and his ostensible attorney violated his constitutional right to counsel. The instant petition specifically raises the question of prejudicial "spill-over" resulting from that relationship, its taint of the entire trial and whether that taint necessitates reversal.

It was revealed upon the cross-examination of a key prosecution witness that he had previously been represented by attorney Richard Miller, who was counsel to petititioners' co-defendant Marotta (Vol. 4 A.M., p. 1000-1001). It further came to light that the Government had learned, on the day prior to the witness' testimony, of the previous representation by Miller. This representation involved certain charges pending against the witness at the time he surrendered to authorities and entered into an agreement with them for his cooperation (Vol. 4 A.M., p. 913). The Government, however, failed to advise the Court or counsel of this fact. Although Mr. Miller advised the Court that he had been discharged by Marotta, the Court announced that it would refuse to relieve Miller from his representation of the witness. Marotta ob-

jected to his attorney's continued representation, requested substitute counsel and further objected to the Court's direction that Richard Miller remain at counsel table.

Although the Court acknowledged the prejudicial impact upon the jury of learning of the attorney's representation of *two* members of what the Government claimed to be an illegal organization or enterprise, it denied petitioners' motion for mistrial or severance. This, despite the Court's clear recognition that the jury might well conclude that the enterprise alleged by the Government did exist and, in fact, secured legal counsel for its members. The probability that such an idea surfaced in the jury room and perhaps was a motivating factor in conviction was appreciably enhanced by the fact that the Government claimed that one of the ways in which the "enterprise" acted to obstruct the legal process was through the hiring of special attorneys on behalf of the criminal organization.

With the revelation of Miller's role in representing two members of the alleged enterprise, there loomed over the case a dramatization of the Government's theory that an organization/enterprise existed, that it existed for the purpose of carrying on illegal activities, and that one of its objectives was to subvert law enforcement efforts by supplying legal assistance to its alleged members. By virtue of the Miller disclosure, the jury could not avoid the suggestion that the attorneys in this joint trial were engaged in some sort of "mob legal services" arrangement with the defendants. This was dangerously close to the surface in this particular case where the indictment alleged obstruction of justice and charges were framed to suggest the manipulation of the legal system.

The spill-over prejudice from one defendant to the other by virtue of the admission is thus not speculative but, to the contrary, readily flows from the very indictment framed by the Govern-

ment. As recognized by this Court in *Kotteakos v. United States*, 328 U.S. 750, 772-773 (1946),

> "guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application... The proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass... Our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The Court further recognized that "the dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place. *Id.* at 774.

The refusal of Courts to admit "spill-over" proof which leads to guilt by association has been consistently recognized. *See, United States v. Rosenwasser,* 550 F.2d 806 (2d Cir. 1977); *United States v. Echeles,* 352 F.2d 892 (7th Cir. 1965). This is especially true where, as here, the prejudicial evidence is related to the charges against the complaining defendant. *United States v. Rosenwasser, supra.* Similarly, this Court in *Bruton v. United States,* 391 U.S. 123 (1968), assessed the prejudicial effect upon one co-defendant of a co-defendant's confession. This Court recognized that such a spill-over effect is a "hazard we cannot ignore" (*Id.* at 137).

The outright violation of petitioners' clear constitutional right to a fair trial by the delineated prej udicial spill-over demands this Court's intervention to guarantee that the lower courts are apprised that they must act incisively and promptly to avoid the taint which too often accompanies the trial of mass defendants.

B. *The inability to confront witnesses.*

Miller was also sought as a defense witness when he disclosed to defense attorneys that he had been present at a meeting alleged by the Government to have occurred on April 23, 1978, following the murder and funeral of Samuel Gingello, a purported associate of the defendants. The Government claimed that it was at this very meeting that these defendants formulated and agreed upon a plan to seek out and kill members of the alleged factions opposed to the defendants. Anthony Oliveri testified as a witness to the circumstances surrounding this alleged meeting, including his claim that only men were present on that occasion.

At the close of the Government's case, defense made a formal offer of proof with regard to Miller's testimony as to the Monachino inconsistencies, including the fact that the so-called April 23, 1978, "meeting" was instead, the family's gathering to mourn after the funeral. Women and children were present. The defense also proposed to offer Miller's testimony that while he was in attendance he observed no group of men, including petitioners, meet apart from the general gathering or carry on private or suspicious conversations. The Court denied petitioners the right to present this testimony.

The extreme importance of a defendant's right to present witnesses in his own defense, as recognized by this Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973) has been previously noted in this petition (*supra*, p. 9). Suffice it to say, then, that this right, essential to a fair trial, was denied by the lower court on more than one occasion.

The standard for review of the exclusion of such exculpatory evidence from the jury entails evaluating the possibility that the evidence, once admitted, "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) quoting *Napue v. Illinois*, 360

U.S. 264, 271 (1959). As recently as July 1985, this Court again recognized that evidence favorable to an accused, if disclosed and used effectively, may make the difference between acquittal and conviction. *United States v. Bagley,* ____U.S.____ , 105 S.Ct. 3375 (1985).

The Court's sole finding in this regard was that Mr. Miller's testimony was not "essential" to the defendants. The abuse of the Court's discretion in its assessment is evident in the fact that the Court made this purported finding prior to the actual proffer of prejudice which was itself summarily rejected without comment by the Court.

Once again it is clear that the lower court failed to recognize the significance and fundamental nature of a defendant's right to present witnesses on his behalf. This Court's direction and guidance are clearly needed to advise the courts as to the scope and extent of this fundamental right accorded to all defendants.

POINT IV

FED. R. OF EVID. 801(d)(2)(E) DEMANDS A FINDING OF INDEPENDENT INDICIA OF RELIABILITY IN ORDER TO COMPORT WITH THE CONFRONTATION CLAUSE AND THIS COURT'S DECISION IN *U.S. V. INADI,* 106 S.CT. 1121.

The prosecution of this case depended, in its entirety, upon the testimony of unindicted co-conspirators Angelo Monachino, Anthony Oliveri, Thomas Pelusio, Thomas Digulio and Vincent Rallo. Each of these men testified to innumerable statements made by various co-conspirators in the alleged extortion conspiracy and it can fairly be said that, without their testimony, the Government would have been unable to present a prima facie case.

Given the multitude of these declarations, the constitutionality of their admission is of especial concern to petitioners. They argued that because no independent indicia of reliability of each of the co-conspirators' statements had been established on the record, their admission under Fed. R. of Evid. 801(d)(2)(E) was violative of the confrontation clause. The Second Circuit gave but scant attention to the subject, essentially assuming that if the requirements of the hearsay rule were met, the rigors of the confrontation clause were likewise satisfied: " 'This is true because a decision in furtherance of a conspiracy would be against the penal interest of the declarant.' *United States v. Perez*, 702 F.2d, 33, 37 (2d Cir.) *cert. denied* 462 U.S. 1108 (1983)." So finding, the Court held that the admission of co-conspirators' statements did not violate the Sixth Amendment (A-5).

Petitioners challenge the propriety of that ruling and ask the Court to take up the question in view of the related concerns posed in its very recent decision in *United States v. Inadi*, ____U.S.____ , 106 S.Ct. 1121 (1986). This record presents an appropriate opportunity to determine whether independent indicia of the reliability of co-conspirators' declarations are constitutionally required.

The holding of *Inadi* was specific, indeed. The Court ruled only that the confrontation clause does not require a showing of unavailability as a prerequisite to admission of the out-of-court statements of a non-testifying co-conspirator. In so deciding, the Court clarified that the unavailability requirement established in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) applies only when the prosecution seeks to admit prior testimony, as opposed to co-conspirators' statements.

The necessity of predicating admissibility upon a finding of reliability, however, remains uncertain. Although the Court gave indication that its decision did not eradicate the need for that show-

ing of reliability (*Id.* at 106 S.Ct. 1124, fn. 3), the approach it took and its very language may belie that guarantee.

In distinguishing *Ohio v. Roberts*, the Court wrote that the in-court testimony of a co-conspirator can never replicate the context and circumstances under which statements uttered in furtherance of the conspiracy were made. Thus, apart from whether or not the Court is suggesting that the statements have an inherent reliability, the query arises as to whether the Court is implying that the demands of the confrontation clause must accede to the evidentiary value inhering from Rule 801(d)(2)(E)'s hearsay exemption. *Inadi* states:

> "To the contrary, co-conspirators, statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplacable as substantive evidence." (*Id.* at 106 S.Ct. 1127).

Whether or not the Court would welcome as broad an interpretation of *Inadi* as would find automatic reliability in co-conspirators' declarations is a cogent and crucial question, especially in light of the Second Circuit's apparent drift towards such a course. Nor is the Second Circuit the only Court of Appeals in need of the direction which would result from a grant of certiorari in this case. As the dissent observes in *Inadi*, there is a direct conflict among the circuits with several requiring particularized inquiry into the reliability of co-conspirators' statements and others having decided instead that declarations admitted under the co-conspirator exemption of 801(d)(2)(E) automatically satisfy the strictures of the Sixth Amendment.

A subsidiary issue, but one raised by the petitioners below, and particularly germane in a situation where the Government's case is essentially conceived out of the co-conspirator declarations is the continuing viability of the "crucial" and "devastating" dichotomy of *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210 (1970). Its

life after Inadi should receive the Court's scrutiny and this case presents an ideal vehicle for the continued probe of the intersection between the confrontation clause and the heresay rule.

POINT V

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 18 U.S.C. §1961 *ET SEQ.* AND DECISIONS OF THIS COURT CONCERNING THE PROTECTIONS AFFORDED BY THE DOUBLE JEOPARDY CLAUSE.

The point at which double jeopardy attaches under a RICO prosecution has not been squarely addressed by this Court. Petitioner Marino's analysis of the double jeopardy problem under RICO was brought to this Court's attention in a petition for certiorari to the Second Circuit Court of Appeals in *U.S. v. Russotti*, 717 F.2d 27 (2nd Cir. 1983). Certiorari was denied at 465 U.S. 1022 (1984) but appellant asks the Court again to consider a grant of review because of the ever increasing number of RICO prosecutions and the resultant fear of prosecutorial excesses.

Petitioner had argued that although the Government was not totally precluded from reprosecuting him under the 1982 RICO indictment, it was limited in the scope of the prosecution. Petitioner asserted that because he had been acquitted in 1976 of membership in the same enterprise to be tried under the 1982 indictment, the Government could not relitigate his association with that enterprise during the years covered under the indictment, 1971-1975, and by use of the same evidence previously litigated under the first RICO indictment. Petitioner further averred that the Government could not include as one of the predicate acts of racketeering under the 1982 indictment, the 1976 murder of Jimmy Massaro. Because the Government knew of petitioner's

alleged involvement in that homicide when it filed its 1976 indictment and because that homicide could have been charged as a predicate act of racketeering in 1976, the double jeopardy clause forbids its inclusion in the pending indictment.

The Second Circuit held that the allowable unit of prosecution under RICO involved consideration of both elements of the statute: the enterprise element and the pattern of racketeering element. The Court thus concluded that a valid claim of double jeopardy would arise only if both the enterprise and the pattern of activity alleged in the 1976 indictment were the same as those alleged in the 1982 indictment. Because the Court found that the 1976 indictment charged an arson for hire pattern of racketeering by the enterprise, while the 1982 indictment charged an extortion pattern, even though by the same enterprise, no double jeopardy problem was implicated by the pending prosecution.

Resolution of the double jeopardy claim through examination of the claimed pattern of activity is unsatisfactory for several, interrelated reasons. First, the Court of Appeals which have addressed the definition of a pattern of racketeering under RICO have invariably held that predicate acts of racketeering need not be interrelated in order to create a pattern since the enterprise element of the statute provided the underlying link among the various predicate acts. See *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

Because the Government need allege no more than two predicate acts to establish a pattern of racketeering and because those acts need not be related to each other, the Second Circuit's holding could obviate the possibility of any double jeopardy claim ever arising under RICO. The Government need only draft RICO indictments based upon two predicate acts concerning one enter-

prise, holding, in case of acquittal as happened here, other acts in reserve concerning the very same enterprise during the same time period. While the Second Circuit voiced its sensitivity to petitioner's concern in this regard, it found that the problem had not arisen in this case because the indictments "allege distinct patterns of racketeering activity" *See, United States v. Russotti, supra,* at 34.

However, it is in this case, where the Second Circuit found "distinct patterns" that the danger of the Court's interpretation is underscored. Petitioner does not argue that the 1982 indictment cannot be prosecuted. Rather, he argues that because the Massaro murder could have been included in the 1976 indictment, double jeopardy forbids its prosecution at this point since it is an incident of the crime earlier charged. The Second Circuit disagreed since "the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its extortion scheme — a scheme which had no relationship to the 1976 arson-for-hire activity". *Russotti, supra,* at 34.

Petitioner respectfully submits that this conclusion reveals the artificial construct created by the Second Circuit. The Massaro murder occurred on November 23, 1973. The next alleged act in the purported extortion indictment allegedly occurred sometime in 1977. Thus, there is no inherent reason why the Massaro murder is any more related to the extortion pattern than the arson pattern. Indeed, the converse would be the more logical position given the gap between the time of the murder and the time of the acts alleged in the 1982 indictment, as opposed to the time of the acts in the 1976 indictment. The only connection on the face of this record is that the respondent includes that act in the extortion indictment. Nonetheless, even if the respondent alleged it to be so, the Government need not prove, in order to try the case, any connection between the Massaro murder and the other predicate

acts alleged (*United States v. Weisman, supra*). There is, then, no protection against the risk of exponentially increasing indictments: the Government may carve up a single enterprise into multiple RICO indictments simply by picking and choosing separate acts of racketeering in support thereof even where, as here, they are based on the same time period and cadre of witnesses.

The probability of increased prosecutions under a similar theory was condemned in *Sanabria v. United States*, 437 U.S. 54 (1978). In *Sanabria*, the defendant was charged with violating 18 U.S.C. §1955 forbidding association with an illegal gambling business. At the close of trial a judgment of acquittal was entered on the basis of insufficient proof that the defendant had been involved in horse betting. The Government sought to reprosecute defendant on that portion of the indictment related to numbers betting, arguing that the numbers and horse wagering constituted discrete bases of liability even though conducted by the same gambling enterprise over the same time span.

This Court rejected the argument holding that Sanabria could not be prosecuted for involvement in the same gambling business by a different means of commission. This Court noted:

> "If we were to accept the Government's theory, each of these [the specific means of participation in the gambling business] could be varied one at a time, to charge a separate count on which a defendant could be reprosecuted following acquittals on any of the others." (*Sanabria, Id.*, at 2183, fn.32).

In *Sanabria*, the Court analogized to *Braverman v. United States*, 317 U.S. 49 (1942) and held that just as the essence of the conspiracy is the *agreement* to commit an illegal act, the essence of 18 U.S.C. §1955 was participation in a gambling *business*, not the means of that participation.

Because, as respondents herein concede, the RICO statute is *pari materi* with 18 U.S.C. §1955, which in turn was equated in its essence with the crime of conspiracy, analogy to criminal conspiracy law is apt. The gist of a conspiracy is the agreement itself which "embraces and defines its objects" (*Braverman v. United States*, *Id.* at 53). Similarly, under RICO, rather than attempt a virtually meaningless analysis of the pattern of racketeering activity, a double jeopardy inquiry should focus on the enterprise which is that element under RICO providing the unifying link between disparate predicate acts (*United States v. Weisman*, *supra*). Scrutiny of the enterprise element of the statute is all the more germane in a case where, as here, the business of the enterprise is alleged to be entirely illegal. In that case, emphasis on the pattern acts of racketeering will swallow the concept of the enterprise itself. As this Court explained in *United States v. Turkette*, 452 U.S. 576 (1981), the enterprise and pattern acts are different elements of the crime each of which must be proven separately. This distinction is obviated, however, when an allegedly illegal enterprise is defined only through its pattern acts.

Thus, just as a conspiracy is understood by reference to the agreement which defines its objects, a RICO violation is best comprehended by reference to the enterprise which defines the requisite *pattern* of racketeering especially where the enterprise is claimed to be an illegal one. Otherwise, the distinction which this Court has determined must exist between the pattern acts and the enterprise would vanish since to embrace the decision below would permit the entire activity and composition of the enterprise to consist of nothing more than the commission of the requisite pattern acts.

While the Second Circuit did not deny the significance of conspiracy law precedent, it held that petitioner's analogy failed because in this case there were two distinct criminal endeavors equivalent to two distinct conspiracies. Petitioner, however, con-

tends that both the 1976 and 1982 indictments charge but one crime, or to use the conspiracy analogy, one single conspiracy, having as its object the commission of various predicate illegal acts, one of which was the Massaro murder, which is equally related to each set of pattern acts, those of the 1976 indictment and those of the 1982 indictment.

The Second Circuit had previously recognized that in a conspiracy prosecution the Government can readily avoid the strictures of the double jeopardy clause by enumerating diverse overt acts in each indictment, thereby meeting the same evidence test of *Blockburger v. United States*, 284 U.S. 299 (1932). Therefore, in *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), the Court concluded that it would determine whether there was one conspiracy or two by utilizing similar factors adopted by the Second Circuit in analyzing this case. *Mallah* did not deny the reality of two different conspiracies but stated, quoting *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937):

> ". . . if the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy *during the period charged is barred* . . . if in fact the second indictment involves substantially the same conspiracy as the first . . ." (*Mallah*, *Id.* at 985, emphasis supplied).

In *Mallah*, while the Court examined the nature and scope of each conspiracy alleged, it held that the fact of different overt acts in each indictment was not instructive as to the scope of the crime. Similarly, in a RICO case, while it may be appropriate to consider the time frame, actors, location and other indicia of two alleged RICO offenses, it is inaccurate to rely upon the nature of the predicate acts to determine whether there is one RICO crime or two.

Adoption of the analysis in *Mallah* to this case does not impose the prosecutorial straitjacket which the respondent and the Second Circuit fear. Petitioner is not attempting to foreclose the Government from trying any violation of the statute which had not even occurred upon filing of the first indictment and which might therefore constitute a new crime under the same statute. The Government should not, however, be allowed to try petitioner piecemeal on acts of racketeering which are incidents of one crime and which occurred during the same time period of the commission of that crime. This Court stated in *Brown v. Ohio*, 431 U.S. 161 (1977): "Where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense" (*Brown, Id.*, at 168, quoting *In Re Nielsen*, 131 U.S. 176 at 188 (1889)).

Nor should the Government be allowed to relitigate an element of the crime of which the petitioner has already been acquitted: membership in the same enterprise at issue in the present indictment for the years 1971-1975. That acquittal bars any further prosecution for association with the same enterprise during the same time period under the presently pending indictment (*Sanabria, Id.*, at 171-172).

With the enactment of the RICO legislation, the Government has been handed a new weapon in its arsenal against organized crime. Indeed, the very broad reach of RICO poses the potential for undue prosecutorial zeal. (*United States v. Huber*, 603 F.2d 387 [2d Cir. 1979], *cert. denied*, 445 U.S. 927 [1980]). Given the expanded scope of allowable prosecutions under RICO, petitioner respectfully submits that the intersection of the double jeopardy clause and RICO is a matter of significance to this Court particularly where the business of the enterprise is said to be illegal. Instruction by the Court is necessary to resolve the problems herein in an effort to avoid future RICO prosecutions which are

drafted to escape the strictures of the double jeopardy clause and, at the same time, to instruct both the Court and criminal defendants of the point at which jeopardy attaches under RICO.

POINT VI

THERE EXISTS A CLEAR CONFLICT AMONG THE CIRCUITS WHETHER A DEFENDANT MAY BE SENTENCED CONSECUTIVELY FOR VIOLATIONS OF TITLE 18 U.S.C. §§1962(c) AND 1962(d)

The first count of the indictment alleged that defendants participated in an enterprise affecting interstate commerce through pattern acts of racketeering activity. The pattern acts virtually all contained allegations that defendants conspired to violate various state and federal statutes.

The second count charged that defendants conspired to commit those substantive acts specified in Count I in violation of Section 1962(d).

Generally, *Wharton's* rule requires merger of a substantive offense and a conspiracy when, by definition, an intended substantive offense requires concerted action by two or more persons. (*See*, i.e., *Ianelli v. United States*, 420 U.S. 770, 779-86 (1975). In the instant case, therefore, without benefit of a special verdict, it is impossible to determine whether the jury convicted defendants in the first count solely of having committed various pattern acts of conspiracy. If that had occurred, such a finding would be identical to that necessary for a violation of the second count. Consecutive sentencing thereby punished defendants twice for the exact same conduct.

There presently exists a clear and definite conflict among the United States Circuit Courts concerning this issue.

In *United States v. Sutton*, 642 F.2d 1001 (6th Cir. 1980) the Court wrote:

> "It is apparent to us that §§1962(c) and 1962(d) under the holdings of the Supreme Court in *Ianelli v. United States, supra*, validate both the indictment of these appellants under both sections. Nonetheless, we hold that the proofs in this record showing these defendants violated §1962(c) and 1962(d) were identical. Under these circumstances, we believe that the conspiracy convictions under §1962(d) merge with the §1962(c) convictions for purposes of sentence. In all instances where a sentence on §1962(d) has been made consecutive to a sentence on §1962(c), the sentences for violating §1962(d) are hereby vacated and remanded to the District Court for entry of sentences on §1962(d) *concurrent* with those imposed for violations of §1962(c)." (*Id.* at p. 1040; emphasis added).

Although the *Sutton* decision appears to have a sound basis in law as well as fact, some other Circuits have refused to follow its precedent. Thus, in *United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985) the Court held:

> "Although this Circuit does appear to have addressed a challenge to consecutive sentencing under the reasoning applied in *Sutton*, the double jeopardy rule which has been applied in this Circuit suggests that it would not reach the same result as the *Sutton* court."
>
> * * *
>
> "Because subsections (c) and (d) of the RICO statute require proof of different elements, and because the legislative history of the statute evinces no contrary intent, this Circuit has held that consecutive sentencing for violations of these provision is permissible."

Other Circuit Courts have followed the *Watchmaker* rationale. *United States v. Marrone*, 746 F.2d 959 (3rd Cir. 1984); *United States v. Bagaric*, 706 F.2d 42, 63-64 n.18 (2nd Cir.), *cert. denied sub-nom. Logavorsci v. United States*, 464 U.S. 840, 104 S.Ct.

133 (1983); *United States v. Cagnina*, 697 Fed 915 (11th Cir.), *cert. denied* 464 U.S. 856, 104 S.Ct. 175 (1983); *United States v. Rone*, 598 F.2d 564 (9th Circuit, 1979). This Court should reconcile those competing decisions. Petitioners assert that the *Sutton* rationale is most appropriate.

In this case, if the jury convicted defendants of Count I for having *conspired* to commit various pattern acts of racketeering, and subsequently convicted them of conspiracy to commit those acts under the Second Count, only one offense was committed. As a result, the offenses charged *as were submitted to the jury* were not separate and distinct crimes.

Generally, the assumption underlying the rule of statutory construction stated in *Blockburger v. United States*, 284 U.S. 299 (1932), "is that Congress ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, ____U.S.____, 105 S.Ct. 1668 (1985). Here, the offenses charged were not separate or distinct. Therefore, the consecutive sentences imposed were improper.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted

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APPENDIX

UNITED STATES of America, Appellee,

v.

Donald J. PAONE, Anthony M. Colombo, Joseph R. Rossi, a/k/a "The Hop", Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti, a/k/a "Red", Defendants-Appellants.

Nos. 84-1454, 84-1466, 84-1467, 84-1468, 84-1469, 84-1470 and 84-1471.

United States Court of Appeals,
Second Circuit.

Argued Dec. 16, 1985.

Decided Feb. 5, 1986.

Before TIMBERS, MESKILL and PRATT, Circuit Judges.

TIMBERS, Circuit Judge:

Appellants Donald J. Paone, Anthony M. Colombo, Joseph R. Rossi, Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti appeal from judgments of conviction entered December 17 and 21, 1984 in the Western District of New York, Thomas C. Platt, Jr., *District Judge,* sitting by designation.

Following a one and one-half month jury trial, appellants were found guilty of substantive violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and of conspiracy to violate RICO, 18 U.S.C. §§ 1962(c) and 1962(d) (1982). Three of appellants' co-defendants were acquitted by the jury. The district court sentenced each appellant to twenty years imprisonment on each of the two counts upon which they were convicted. Sentences were ordered to run consecutively for appellants Russotti, Piccarreto, Marino, Rossi, and Colombo. For

appellants Marotta and Paone, the sentences were ordered to run concurrently.

We find that the principal issues raised on appeal which warrant discussion in this opinion are (1) whether the admission of co-conspirators' statements at the trial violated the Federal Rules of Evidence or the confrontation clause of the Sixth Amendment; (2) whether appellant Marotta was denied his right to conflict-free counsel because his retained lawyer had represented a government witness seven years earlier; (3) whether the New York corroboration of accomplice testimony requirements is incorporated in a RICO prosecution; and (4) whether the testimony of a Rochester policeman, which the court eventually struck, was so prejudicial as to require a reversal. Other subordinate claims are raised.

Several appellants have adopted by reference points raised in the briefs of their co-appellants pursuant to F.R.A.P. 28(i).

For the reasons set forth below, we affirm the judgments of conviction of each appellant upon each count upon which he was convicted.

I.

We summarize only those facts believed necessary to an understanding of the principal issues raised on appeal.

Appellants' convictions arose from their participation in the conduct of a criminal enterprise in the Rochester, New York, area during an eleven year period. The indictment charged that between February 1971 and November 1982 appellants participated in a racketeering enterprise that extorted funds from gambling operations, and tried to prevent a rival group from encroaching on its control over gambling activities.

The predicate acts underlying the RICO charge encompassed a variety of serious offenses, including: the murder of Vincent Massaro; the murder of Thomas Didio; the attempted murders

of rival leaders; attempted arson, extortion, and obstruction of justice. Former members of the enterprise testified on behalf of the government regarding these offenses and about appellants' positions in the crime organization. Testimony disclosed that, before gambling joints could operate in the Rochester area, permission had to be obtained from the organization. The gambling clubs paid the organization between $400 and $1800 each week, even though the organization did not provide services to the clubs.

One of the predicate acts included in this RICO indictment was the 1973 murder of Vincent Massaro. In 1977 appellants Russotti, Piccarreto, Marino and Marotta were convicted of this offense in the New York Supreme Court for Monroe County. After they began serving their sentences, it was discovered that sheriff's deputies had committed perjury during the trial. On motion of the Monroe County District Attorney, the judgment was vacated, the indictment was dismissed, and these four appellants therefore were released. During their limited incarceration, disputes arose over the leadership of the organization. Some members were expelled from the organization. A rival group vied for control over the gambling operations. This "war between the factions" led to the murder of rival Thomas Didio, the attempted murder of Rosario Chirico, the attempted murder of Sonny Celestino, and the attempted arson of Chirico's place of business. The activities of this rival group are described in our opinion in *United States v. Barton,* 647 F.2d 224, 228-29 (2 Cir.), *cert. denied,* 454 U.S. 857 (1981).

There of course was a great deal of other evidence, some of which we shall refer to in our discussion of the principal claims of error which follows.

II.

The government presented its case primarily through the testimony of former members of the enterprise. Appellant Paone

claims that a number of co-conspirator statements concerning the activities of the enterprise were admitted in violation of the Federal Rules of Evidence and the confrontation clause of the Sixth Amendment. We disagree.

Under Fed.R.Evid. 801(d)(2)(E), a statement does not constitute hearsay if it is "offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Appellant asserts that the court allowed government witnesses to testify about statements which did not comply with the timing element that a statement can be made "during" the conspiracy and the motive element that a statement be "in furtherance" of the conspiracy.

[1] Appellant's claim that the court should not have admitted such statements under Rule 801(d)(2)(E) because they were not made "during" the conspiracy rests on the erroneous premise that the indictment related only to criminal conduct which occurred after 1978. The indictment, however, sets forth acts beginning as early as 1971. The RICO indictment centered on appellants' conduct in extorting funds from gambling houses in Rochester. The predicate acts can be traced readily to this criminal design. Vincent Massaro was killed because of his disobedience and his displeasure with his share of the proceeds from the racketeering activity. Also, the rift within the organization, which led to the murders and attempted murders of rival group leaders, erupted during the incarceration of the Massaro murder participants. The gambling houses provided the funds for the operation of the enterprise. Statements made before 1977 relating to the collection of these funds clearly were made during and in furtherance of the conspiracy. We cannot say that the conspiracy began as late as 1977. We therefore reject the claim that the 1973 Massaro murder and the gambling operations antedated the conspiracy. We also are not persuaded that the "in furtherance" requirement is a stringent as appellant urges.

Appellant points to portions of the testimony of government witness Thomas Pelusio as examples of narrative testimony that did not comply with the "in furtherance" requirement of Rule 801(d)(2)(E). Pelusio testified about a conversation concerning the Didio murder, a conversation in which he and some appellants participated. One appellant was reported as commenting on the manner in which Didio was killed, stating that it took only one bullet. Another appellant was reported as saying he wished that he had been present to watch Didio bleed. Other claims of error are based on the admission of testimony relating to 1975 and 1976 gambling operations and the 1973 Massaro murder.

[2] To begin with, in order to comply with the "in furtherance" requirement, there must be evidence that establishes the conspiracy and that the defendant participate in it. 4 Weinstein & Berger, Weinstein's Evidence § 801(d)(2)(E)[01], at 801-244 (1985); *United States v. Lieberman,* 637 F.2d 95, 102 (2 Cir.1980); *United States v. Lyles,* 593 F.2d 182, 194 (2 Cir.), *cert. denied,* 440 U.S. 972 (1979). We are satisfied that the participation of each appellant in the instant conspiracy was established. Once a conspiracy is shown to exist, the "evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Provenzano,* 615 F.2d 37, 45 (2 Cir.), *cert. denied,* 446 U.S. 953 (1980) (quoting *United States v. Head,* 546 F.2d 6, 9-10 (2 Cir.1976), *cert. denied,* 430 U.S. 931 (1977)).

[3] Appellant also asserts that the narrative descriptions by the government witnesses did not satisfy the "in furtherance" requirement. In *United States v. Birnbaum,* 337 F.2d 490, 495 (2 Cir.1964), we recognized that mere idle chatter will not satisfy what is now Rule 801(d)(2)(E). Frequently, however, such statements may be admitted as declarations against penal interest, *Lieberman, supra,* 637 F.2d at 103, or under the state of mind exception to the hearsay rule. *United States v. Cicale,* 691 F.2d 95, 103-05 (2 Cir.1982), *cert. denied,* 460 U.S. 1082 (1983). We also have recognized that the "in furtherance" requirement of Rule

801(d)(2)(E) is satisfied when a co-conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance. *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983); *United States v. Mangan,* 575 F.2d 32, 44 (2 Cir.), *cert. denied,* 439 U.S. 931 (1978). In light of those principles, we are satisfied that there was no error here.

[4] Even if some of the informants' testimony did cross the line, appellant has not convinced us that the instant trial was tainted by any such testimony that might not have comported with Rule 801(d)(2)(E). This trial extended over a period of one and one-half months. In a trial of this length, we are mindful that the chance that a single error, assuming arguendo that such did occur, would be significant enough to cause reversal or mistrial is not as great as appellants would have us believe. "Experience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *United States v. Jones,* 766 F.2d 994, 1004 (6 Cir. 1985) (quoting *In re Beverly Hills Fire Litigation,* 695 F.2d 207, 227 (6 Cir.1982), *cert. denied,* 461 U.S. 929 (1983)).

[5] In addition to his claim under Rule 801(d)(2)(E), appellant asserts that the admission of hearsay statements of co-conspirators violated his rights under the confrontation clause. The statements, according to appellant, did not contain sufficient indicia of reliability. Where co-conspirators' statements are so "crucial" to the prosecution and "devastating" to the defense, according to appellant, the confrontation clause is violated. We do not agree.

In *United States v. Puco,* 476 F.2d 1099, 1107 (2 Cir.), cert. denied, 414 U.S. 844 (1973), in commenting on a petition for rehearing, the Court made clear that, "[W]e did not and do not hold that a trial judge must find, before admitting a co-

conspirator's declaration, that it is not 'crucial' to the Government's case of 'devastating' to the defense." The court also stated:

> "For future applications of *Dutton* [*v. Evans,* 400 U.S. 74 (1970)] to similar situations, we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. . . . In most cases the determination that a declaration is in furtherance of a conspiracy — a determination that the trial judge now must make in every case for admissibility — will decide whether sufficient indicia of reliability were present."

Id. at 1107 (footnote omitted). We also have recognized that "a higher standard of reliability is imposed if the hearsay statements are 'crucial' to the Government's case". *United States v. Stratton,* 779 F.2d 820, 830 (2 Cir.1985) (citing *Dutton v. Evans,* 400 U.S. 74 (1970)). As the *Puco* court indicated, however, the cases in which the requirements of the hearsay rule do not provide sufficient indicia of reliability to satisfy the confrontation clause will be rare. *Id.* at 1107-08. "This is true because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant." *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983). *See also United States v. Wright,* 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) (facts did not support departing from general rule that statements in furtherance of conspiracy contain sufficient indicia of reliability to satisfy confrontation clause).

In our view, the facts of the instant case do not warrant our departing from our earlier decisions. We decline appellant's invitation to require more support for a co-conspirator's statement than is required by Rule 801(d)(2)(E). We hold that the admission

of co-conspirator's statements did not violate the confrontation clause.

We acknowledge that the Supreme Court may address the issue of whether out-of-court statements must be addressed separately under the hearsay rules and the confrontation clause. The question appears to be presented in *United States v. Inadi,* 748 F.2d 812 (3 Cir.1985), No. 84-1580, *cert. granted,* 105 S.Ct. 2653 (May 25, 1985).

Appellant's third attack on the admission of co-conspirator declarations is his claim that the court made an inadequate *Geaney* finding. Under *United States v.* Geaney, 417 F.2d 1116 (2 Cir.1969), *cert. denied,* 397 U.S. 1028 (1970), where hearsay evidence in the form of a co-conspirator statement is admitted "subject to connection", the court must determine, when all the evidence has been received, whether the prosecution "has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence, independent of the hearsay utterances." 417 F.2d at 1120.

[6] Appellant asserts that the court was required to make a specific determination with respect to each defendant as to when he joined the conspiracy and the exact non-hearsay evidence that tied him to the conspiracy. There is not such requirement. In *United States v. Perez, supra,* 702 F.2d at 36, we held that "an implicit *Geaney* ruling can be inferred in the trial judge's decision to receive the evidence and to deny a directed verdict of acquittal on the conspiracy charge." Here, the court made a finding that each defendant was a member of the charged conspiracy. There was abundant evidence linking each defendant to the conspiracy. This is sufficient under both *Geaney* and *Perez.*

We hold that the court correctly admitted the co-conspirator's statements.

III.

[7] Several former members of the conspiracy testified on behalf of the government. Midway through the trial, government witness Monachino, a former member of the enterprise, disclosed on cross-examination that in 1975 attorney Richard Miller, who was representing appellant Marotta at the instant trial, had represented him, Monachino, in obtaining bail when Monachino was arrested on unrelated charges in 1975. Marotta thereupon requested that Miller be discharged as his attorney in the instant case. Marotta sought permission to retain new counsel. The court denied both requests after conducting an exhaustive colloquy with Monachino. Marotta claims that, since his retained attorney, seven years earlier, had represented a government witness who was testifying against Marotta in the instant case, his Sixth Amendment rights were violated. Marotta asserts that the disclosure that the same attorney at widely separated times had represented two men, each of whom was a member of the alleged conspiracy, so prejudiced the proceedings as to require a reversal and new trial. We disagree.

[8]While a defendant has a right to counsel of his choice under the Sixth Amendment, it is not an absolute right. *United States v. Ostrer,* 597 F.2d 337, 341 (2 Cir.1979). *See In Re Grand Jury Subpoena Served Upon John Doe, Esq. (SLOTNICK),* ____F.2d____, ____, (2 Cir.1986) (Jan. 9, 1986). Absent a conflict of interest, a defendant in a criminal case does not have the unfettered right to retain new counsel, particularly after trial has commenced. In determining whether to allow a defendant to retain new counsel, the court must consider whether a severance would then be required, the risks and problems associated with the delay, and whether substitutions would disrupt the proceedings and the administration of justice. *McKee v. Harris,* 649 F.2d 927, 931 (2 Cir.1981), *cert. denied,* 456 U.S. 917 (1982).

[9] We recognize that a defendant in a criminal case is entitled to conflict-free representation. *Cuyler v. Sullivan,* 446 U.S. 335,

349-50 (1980). For the reasons set forth below, however, we find that, if there was any conflict in the instant case, it was abated during the trial.

First, the government did not realize that attorney Miller previously had represented Monachino until the day before Monachino testified. Miller's representation of Monachino had been ten years earlier and was very limited. Miller had shared office space with Monachino's retained lawyer and merely had aided him in applying for bail. Monachino's need for legal representation at that time stemmed from criminal charges wholly unrelated to the instant case. Miller had not represented Monachino in any way since 1975. Second, Monachino waived any attorney-client privilege he had. As Marotta concedes, Miller subjected Monachino to a "disastrous" cross-examination. Third, following a detailed inquiry into the extent of the relationship between Monachino and Miller, the court carefully informed the jury of the limited nature of the prior representation. The court also explained to the jury that there was a limited universe of criminal defense lawyers in the geographic region and that such past representation was not unusual.

The situation here was not nearly as problematic as in the cases which appellant cites where we held that a defendant was denied his right to effective assistance of counsel. *E.g., United States v. Cancilla,* 725 F.2d 867, 870 (2 Cir.1984) (attorney who had engaged in similar criminal conduct lacked incentive to conduct a vigorous defense); *Solina v. United States,* 709 F.2d 160, 167-69 (2 Cir.1983) (defendant represented by unlicensed attorney).

Particularly in light of the trial court's careful instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any prejudice to Marotta, we hold that the court ruled correctly in refusing to allow Marotta to discharge his trial counsel and to retain new counsel midway through the trial that lasted one and one-half months.

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IV.

[10] Six of the predicate acts underlying the RICO indictment were New York state law offenses of murder, attempted murder and attempted arson. Appellant Marino claims that, since New York state law requires corroboration of accomplice testimony to prove these offenses, such acts did not comply with the definition of "racketeering activity" under RICO. We disagree.

The RICO statute, 18 U.S.C. § 1961(1)(A) (1982), defines "racketeering activity" as "any act or threat involving murder, kidnaping, gambling, arson, robbery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year". (emphasis added). Appellant claims that, if an accused cannot be charged in the New York state courts for these offenses in the absence of accomplice testimony corroboration, he cannot be charged under the federal RICO statute. The court overruled appellant's claim in this respect at the close of the government's case and during the pre-charge conference.

We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge. *United States v. Licavoli,* 725 F.2d 1040, 1047 (6 Cir.), *cert. denied,* 104 S.Ct. 3535 (1984). To adopt appellant's reading of "chargeable" would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other — simply because of differences in what are essentially procedural rules. As in *United States v. Bagaric,* 706 F.2d 42, 62-63 (2 Cir.), *cert. denied,* 464 U.S. 840 (1983), we refuse to sanction such inconsistent results. Other courts' interpretations of § 1961(1)(A) support our interpretation of the statute. *See, e.g., United States v. Brown,* 555 F.2d 407, 418 n. 22 (5 Cir.1977), *cert. denied,* 435 U.S. 904 (1978) (rejecting Georgia's accomplice testimony cor-

roboration requirement in a RICO prosecution); *United States v. Licavoli, supra,* 725 F.2d at 1047, and cases cited therein (even though Ohio law precludes separate punishment for conspiracy to murder and murder, each can serve as separate predicate act in a RICO prosecution).

We hold that the district court correctly ruled that the New York corroboration of accomplice testimony requirement is not incorporated in a RICO prosecution.

V.

[11] Officer Pecora of the Rochester police department was called as a government witness at trial. Pecora's testimony included relating his June 18, 1978 conversation with appellant Marotta. Pecora had relayed to Marotta a description of the "mob war" in the Rochester area, based on descriptions which two informants had provided. Pecora testified that he asked Marotta to comment on the informants' stories. Pecora then repeated in court Marotta's reaction to the informants stories. Pecora's testimony also described appellants Russotti and Piccarreto as leaders of the organization. This hearsay testimony by Pecora on direct examination included the following:

> "Q. What else did you tell him?
>
> A. I also told Mr. Marotta that the first man stated that Sammy Gingello had declared himself over Samuel Russotti and Rene Piccarreto, and that there was no more equal power.
>
> I also told him that the man had stated to me that at approximately two weeks after the murder of Sammy Gingello that the A and the B team had a meeting, and it was suggested that this city be split into two parts with the river — or Main Street being the dividing line; that the A team found this acceptable, but the B team did not, and was primarily opposed to Sonny Celestino, and nothing was resolved at this meeting.

The bombings continued, and — both the A and B team became disorganized. He also stated that the A team was losing its hold by not being effective in taking care of the B team. Also stated to—

. . .

Q. What did you tell him the second man had stated to you?

A. The second man stated that in regards to the beating incident, that the whole problem would have ended with the beatings, but then the pipe bomb was found on Clifford Avenue and that started it all over again.

He stated that — the second man stated that the power structure of Samuel Gingello, Red Russotti and Rene Piccarreto was the same when they got out of jail as it was when they went to jail.

He also stated that the A team was suffering financially as a result of the bombings, and they were having difficulty — the A team was having difficulty — difficulty locating members of the B team.

He also stated that the problem would not be resolved unless at least these people are eliminated.

He also stated that members of the motorcycle club were probably the people that associated with Thomas Torpey.

After telling him these things, Mr. Marotta responded only by saying that he agreed with — with the beatings, what happened in the beatings, but he said there was — he was not sure that exactly happened because he was in jail at the time.

He did say that — those members, those men, were told that—

. . ."

The court first admitted the testimony tentatively, subject to later consideration. The court thereafter considered striking the testimony completely if Pecora did not disclose the identify of the informants. The court next decided to instruct the jury that the testimony was admissible against Marotta only. When Pecora

was recalled for cross-examination, the court finally instructed the jury to disregard completely the controversial testimony of Pecora. Pecora refused to disclose the identity of the informants and was held in contempt.

Pecora appealed to this Court from the order holding him in civil contempt. We vacated the contempt order, holding that Pecora was not required to disclose the identity of the informants since the court had struck Pecora's testimony. *United States v. Russotti,* 746 F.2d 945, 950 (2 Cir.1984). We observed that at that point in the trial the record did not establish such prejudice as to require a retrial because of the Pecora episode. *Id.* Our careful examination of the entire record, including events subsequent to Pecora's being held in contempt, satisfies us that nothing in the Pecora episode warrants disturbing the judgments of conviction.

Appellant Russotti, joined by several of the other appellants, argues that, even though the court struck the testimony eventually, its disclosure was so prejudicial as to require a reversal. Appellants assert that the jury was left with the impression that the informants existed, that what they said was true, and that the officer's reliance on the unnamed informants gave the government's witnesses who were former members of the enterprise increased credibility.

Appellants rely on *Bruton v. United States,* 391 U.S. 123 (1968), for the proposition that their inability to cross-examine the sources of Pecora's testimony violated the confrontation clause. In *Bruton,* the jury had been asked to apply a confession obtained after arrest to the hearsay declarant but not to his co-defendant. The issue before us is whether the court's instruction to the jury to disregard completely the testimony relating to the June 18 conversation was sufficient to obviate any prejudice to appellants.

Appellants Russotti and Piccarreto claim particular prejudice because they were identified as leaders in the organization. Other witnesses, however, testified as to the conduct and leadership po-

sitions of these same appellants in the organization. We are satisfied that the claimed prejudice was not as "devastating" as appellants assert. Moreover, unlike the situation in *Bruton,* the jury was not asked to apply the testimony to only some appellants, nor were these hearsay declarations made "post-arrest".

While we do not applaud the sequence of events here, we are mindful that occasions do arise, particularly during the course of a long trial, where, on balance, it is in the interest of the fair administration of criminal justice that a jury be given corrective instructions. We hold that this is such a case. *See United States v. Nixon,* 779 F.2d 126, 133 (2 Cir.1985). The jury was not asked to perform olympian mental gymnastics. Indeed, the court's expression of grave concern over this testimony during the trial may well have redounded to the benefit of appellants because the court emphasized to the jury the importance of disregarding the testimony entirely.

We hold that the court's corrective instruction to the jury, together with the factors referred to above, obviated any prejudicial impact of Pecora's testimony upon any of the appellants. We hold that the court did not err in any respect in its handling of the Pecora episode, including its refusal to grant appellants' motion for a mistrial.

[12] We believe it is appropriate and necessary to add a word of caution to the government. Preparation for and conduct during this long and somewhat complicated case no doubt were taxing on both the prosecution and defense counsel, as well as on the court. The government's proffer of Pecora's testimony, however, more resembled risk-creating improvisation than fine-tuned choreography. The government should have avoided this potential for prejudice by screening the testimony with appellants' counsel and the court before trial rather than plunging ahead with such hearsay testimony. After carefully reviewing the record, we believe that the government did not intentionally mishandle the proffer of Pecora's testimony. The scrutinizing trial judge abated

the potential prejudice. He displayed the patience of Job and the wisdom of Solomon throughout. We nevertheless reiterate the admonition to government counsel which Judge Newman stated in one aspect of this very case, *United States v. Russotti, supra,* 746 F.2d at 950, except that we underscore that admonition. United States attorneys are charged with knowledge of the decisions of this Court in criminal cases. Any disregard of our admonition in future cases will be dealt with accordingly.

VI.

Appellants have raised other subordinate claims of error which we do not believe merit discussion.

For example, appellants' claim that the inclusion of the 1973 Massaro murder as a predicate act violated the double jeopardy clause of the Fifth Amendment was rejected by us in an interlocutory appeal. *United States v. Russotti,* 717 F.2d 27 (2 Cir.1983), *cert. denied,* 465 U.S. 1022 (1984). We hold that there is no reason to disturb that decision.

Other subordinate claims of error include whether the predicate acts under RICO were charged and proven adequately; whether the court abused its discretion in denying mid-trial requests for delay; whether the court properly excluded prior sworn testimony of two appellants; whether the court properly refused to allow appellant Marotta's attorney to be called as a witness; whether the government used immunized testimony in its prosecution; and whether consecutive sentences could be imposed for conspiracy and substantive violations of RICO.

We have carefully examined all claims of error raised by all appellants and we find none has merit.

VII.

To summarize: We hold that the admission of the co-conspirators' statements violated neither the requirements of Fed.R. Evid. 801(d)(2)(E) nor the confrontation clause of the

Sixth Amendment; the limited representation of a government witness by appellant Marotta's retained counsel did not violate Marotta's right to conflict-free counsel; appellants' argument that the New York corroboration of accomplice testimony requirement is incorporated in the RICO definition of racketeering activity is without merit; the court's limiting instruction to the jury was sufficient to obviate any prejudice resulting from Officer Pecora's hearsay statements; and all of appellants' other claims of error, having been carefully considered, are without merit.

Appellants were convicted after a one and one-half month trial on the basis of overwhelming evidence of extraordinarily serious offenses committed over a period of time beginning fifteen years ago. We order that the mandate issue forthwith.

Affirmed.

WDNY
CR 82-156
PLATT

United States Court of Appeals

for the
SECOND CIRCUIT

FILED FEB 5. 1986, United States Court of Appeals, Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eight-six.

Present: HON. WILLIAM H. TIMBERS, HON. THOMAS J. MESKILL, HON. GEORGE C. PRATT, Circuit Judges,

UNITED STATES OF AMERICA, Appellee, v. DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE HOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARETO and SAMUEL J. RUSSOTTI, a/k/a "RED", Defendants-Appellants.	Docket Nos. 84-1454 84-1466 84-1467 84-1468 84-1469 84-1470 84-1471

Appeals from the United States District Court for the Western District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk
/s/ By: Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
/s/ ELAINE B. GOLDSMITH
Clerk
(Seal)

FILED MAR 24, 1986, United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of March one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA, Appellee, v. DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE HOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARETO and SAMUEL J. RUSSOTTI, a/k/a "RED", Defendants-Appellants.	Docket No. 84-1467 84-1469 84-1454 (L)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants, Joseph R. Rossi and Richard J. Marino.

Upon consideration by the panel that heard the appeal, it is

Order that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

Nos. 85-1883, 85-1892, 85-1901, 85-1902 and 85-1949

In the Supreme Court of the United States

OCTOBER TERM, 1986

Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

THOMAS E. MAROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD J. MARINO and JOSEPH R. ROSSI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government is precluded under the Double Jeopardy Clause from including a predicate offense in a Racketeer Influenced and Corrupt Organizations Act (RICO) indictment where that offense purportedly could have been, but was not, included in a prior RICO indictment, charging a separate "pattern of racketeering," on which petitioners were acquitted.

2. Whether a New York rule requiring corroboration of accomplice testimony must be applied in a federal RICO prosecution.

3. Whether the admission of co-conspirator statements violated the Confrontation Clause on the ground that the court of appeals assertedly failed to require those statements to be independently analyzed for reliability.

4. Whether petitioner Marotta was denied his right to conflict-free counsel at trial because his attorney, some ten years earlier, had briefly represented a government witness on an unrelated matter, and whether the other petitioners were prejudiced by this purported conflict of interest.

5. Whether the district court properly refused to allow petitioner Marino to call Marotta's attorney as a witness during trial.

6. Whether the district court correctly refused to admit the prior testimony of two of the defendants where the federal government was not a party to, nor a participant in, the proceedings giving rise to the testimony.

7. Whether consecutive sentences may be imposed for conspiracy and substantive violations of the RICO statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1883

THOMAS E. MAROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1892

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1901

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1902

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1949

RICHARD J. MARINO and JOSEPH R. ROSSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 782 F.2d 386. The opinion of the court of appeals on a prior interlocutory appeal in the same case (85-1902 Pet. App. B1-B18) is reported at 717 F.2d 27.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1986. Petitions for rehearing were denied on March 19 and 24, 1986 (Pet. App. A20; 85-1892 Pet. App. A23-A24). The petition for a writ of certiorari in No. 85-1883 was filed on May 15, 1986; the petitions in Nos. 85-1892, 85-1901, and 85-1902 were filed on May 16, 1986; and the petition in No. 85-1949 was filed on May 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d). Each petitioner was sentenced to 20 years' imprisonment on each of the two counts. Petitioners Russotti, Piccarreto, Marino, and Rossi received consecutive sentences on the two counts, while petitioners

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-1883. "Tr." refers to the trial transcript.

Marotta and Paone received concurrent sentences.[2] The court of appeals affirmed (Pet. App. A1-A17).

The evidence at trial, which was presented over eight weeks and consumed more than 8,000 pages of transcript, established that between 1971 and 1982 petitioners belonged to an organized crime group in the Rochester, New York, area that engaged in the extortion of gambling clubs. To maintain control over the gambling clubs—and to discipline dissident members, combat rival groups, and avoid prosecution—the members of the group engaged in murder, attempted murder, arson, and obstruction of justice. In particular, the indictment charged petitioners with committing, as acts of racketeering, two murders, three attempted murders, two acts of extortion, an attempted arson, and three obstructions of justice.

The evidence showed that in February 1971, Angelo Monachino and Vincent Massaro were inducted into a criminal organization known as the "mafia" or "La Cosa Nostra" in a ceremony at the home of Frank Valenti, the boss of the organization (Tr. 898-904, 913-915, 920). Thereafter, in 1972, Valenti was deposed and petitioner Russotti became the boss (Tr. 927-930). At the same time, Sam Gingello became the underboss, petitioner Piccarreto became the counselor, and petitioners Marino and Marotta became captains (Tr. 927). Under Russotti's direction, Marino was assigned to supervise Monachino, Massaro, Spike Lanovara, and Eugene DiFrancesco (Tr. 932). During the years following Russotti's accession to leadership, new recruits were admitted

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[2] Three co-defendants, Joseph J. Trieste, Joseph L. LaDolce, and John M. Trivigno, were acquitted at trial. Co-defendant Anthony M. Colombo was convicted at trial, but he has not petitioned for certiorari.

into the organization, including John Fiorino, Thomas Didio, and petitioners Paone and Rossi (Tr. [illegible]34-937).

In November of 1973, Eugene DiFranc[illegible]co advised Monachino that Piccarreto had ordered him to "hit" Vincent Massaro. Massaro, DiFrancesco reported, had disobeyed the leadership and complained about not being paid (Tr. 938-940, 947). DiFrancesco asked Monachino to help him carry out the "hit" (Tr. 940). When Monachino and DiFrancesco failed to execute Massaro promptly, Piccarreto met with Russotti, Marino, Gingello, and Monachino, and directed Monachino to take charge of the project personally (Tr. 948-952). Marino suggested that the murder be committed at Monachino's place of business (Tr. 953).

Following orders, Monachino, DiFrancesco, and Lanovara lured Massaro to Monachino's office; there, DiFrancesco shot Massaro in the back of the head and killed him (Tr. 964-965, 967-968). Monachino, DiFrancesco, and Lanovara then put Massaro's body in the trunk of his car, where it was later discovered (Tr. 975). Monachino and DiFrancesco thereafter told Marino that the job was done. Marino congratulated them (Tr. 981-982).[3]

In 1973, Thomas Pelusio obtained permission from petitioner Marotta to open an illegal gambling club in Rochester (Tr. 4159-4160, 4165). Although Marotta provided no services to the club, Pelusio paid Marotta a weekly fee for permission to operate (Tr. 4163-4164). During the following years, Pelusio, again after obtaining permission from Marotta or another organization member, opened several other

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[3] The murder of Vincent Massaro formed the basis for the first racketeering act, charging solicitation and conspiracy to murder Massaro.

gambling clubs in Rochester. In each instance, he made regular payments to Marotta, Didio, or Paone (Tr. 4169-4186). Pelusio understood that if he did not make his weekly payments to the members of the organization, his clubs would not be allowed to operate (Tr. 4182).

In 1976 and 1977, Gingello and petitioners Russotti, Piccarreto, Marino, and Marotta were tried and convicted in state court for the murder of Vincent Massaro (Tr. 6535, 6782). They were imprisoned in early 1977 (Tr. 4190, 6782). Because of his incarceration, Gingello chose Didio to assume his position in the organization (Tr. 4185-4186). During this period of imprisonment, however, because of dissatisfaction with the performance of Didio and his associates, a rift developed within the organization (Tr. 4191). Eventually, a faction led by Didio was expelled from the organization, and two rival factions vied for control of the gambling clubs (Tr. 2731-2734, 2738-2739).

In the fall of 1977, the defendants in the Massaro murder case were released from prison because it was discovered that local law enforcement officers had testified falsely at their trial (Tr. 2723, 2738, 2743-2746, 6535). Gingello's release, and his resumption of a leadership role in the organization, precipitated further violence between the two competing factions. In April 1978, a car bomb killed Gingello (Tr. 1687, 2755). The remaining members of Gingello's faction, which included the six petitioners and their associates Anthony Oliveri and John Fiorino, made plans to pursue those they deemed responsible for Gingello's murder, including Didio, Dominic Celestino, and Rosario Chirico (Tr. 2756-2758, 2767-2769, 2770, 2823-2824, 3553-3556, 4209-4211, 5882).

During May 1978, in furtherance of this revenge scheme, Rossi told Oliveri to follow Chirico in order to determine if there was any way to "get at him" (Tr. 2779). Oliveri thereafter recruited co-defendant Anthony Colombo to shoot Chirico in a wooded area between Chirico's home and his place of business (Tr. 2787-2795). Rossi provided Oliveri with a rifle and a motorcycle driver to assist in his escape (Tr. 2796-2798). On May 25, 1978, Colombo shot at Chirico but only wounded him (Tr. 2806, 6548). When Rossi learned that Chirico had been hit, he commented that "at least we got that much done" (Tr. 2806).[4]

Rossi next directed Oliveri to kill Celestino (Tr. 2813-2814). On June 18, Colombo, Rossi, and Oliveri lay in wait near Celestino's home (Tr. 2815-2816). Their murder attempt failed, however, because Celestino had been arrested earlier that day (Tr. 2816-2818).[5]

Following the attempt to shoot Celestino, Rossi told Oliveri to try to kill Didio, the leader of the rival faction. Fiorino and Paone were also assigned to find Didio (Tr. 2830-2832, 2836-2837). On July 5, 1978, Rossi, Colombo, and Oliveri drove to a motel in the Rochester area where Didio's girlfriend had been seen (Tr. 2852-2853). After the girlfriend departed, Colombo fired a machine gun into the room she had left, killing Didio (Tr. 2857-2863, 6429-6430).

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[4] The attempted murder of Rosario Chirico formed the basis for the second racketeering act, charging solicitation, conspiracy, and attempt to murder Chirico.

[5] The attempted murder of Dominic Celestino formed the basis for the third racketeering act, charging solicitation, conspiracy, and attempt to murder Celestino.

Oliveri, Colombo, and Rossi then sped from the scene. After the men abandoned their weapons and car, Marotta picked them up. Rossi reported, "I think we got him," and Marotta responded, "good" (Tr. 2864-2867).[6]

Following the murder of Didio, Rossi directed Oliveri to burn down the automotive body shop owned by Chirico in order to force him to leave town (Tr. 2883).[7] Oliveri and an associate unsuccessfully attempted to carry out this order, using gasoline and an incendiary device known as a "molotov cocktail" (Tr. 2884, 5598-5607, 5645).

At the same time that the revenge plots were being executed, Rossi and Oliveri assumed responsibility for collecting the ongoing payments from the gambling clubs (Tr. 2739, 2771-2776, 4200). Rossi would take the money to Russotti, Oliveri and Paone (Tr. 2776-2778). After Thomas Torpey, who owned one of the clubs, stopped making his weekly payments, he was visited by members of the organization, first by Piccarreto and Marino, and later by Russotti and Piccarretto. Russotti told Torpey, "You've got something going on in this town. I want a piece of it" (Tr. 4955). Finally, John Fiorino threatened to close the club because Torpey was not paying (Tr. 4976-4978). Fiorino threatened Torpey, "You know, you're no su-

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[6] On a later occasion, Paone said he was surprised that it only took one bullet to kill Didio. He added that he was also surprised that with all the bullets that were fired, only one had hit Didio (Tr. 4215). The murder of Thomas Didio formed the basis for the fourth racketeering act, charging solicitation, conspiracy, and the murder of Didio.

[7] Russotti had earlier tried to obtain some dynamite for the same purpose (Tr. 5884-5890).

perman. You can bleed and die like anybody else" (*ibid.*).[8]

In January 1979, Angelo DiMarco, an owner of one of the clubs making payments to Rossi, was subpoenaed to appear before a federal grand jury (Tr. 1688-1697, 1691-1693, 1726, 2775-2776). When he appeared, DiMarco described to the grand jury how he had given envelopes of cash to an employee every week for delivery to Rossi (Tr. 1728). Shortly thereafter, Rossi directed Anthony Oliveri to kill DiMarco, and he provided the weapons and a car for the murder (Tr. 2900, 2904, 2907). As Oliveri and Colombo waited near DiMarco's house, armed with a shotgun and pistol, a police car approached them and the two men were arrested (Tr. 2909, 2916).[9]

Vincent Rallo, an insurance broker, had arranged on Marino's behalf to register and insure in the names of fictitious persons the cars that were used in the murder of Thomas Didio and the attempted murder of Angelo DiMarco (Tr. 5892-5907, 5921-5934). After Oliveri and Colombo were arrested in one of those cars, Rallo told Marino that he was afraid the car would be traced to him (Tr. 5934). When Rallo was subsequently subpoenaed to appear before a federal grand jury, Marino told him to testify falsely by inventing descriptions of the fictitious persons in whose names the cars had been registered (Tr. 5936).

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[8] Extortions from two of the clubs formed the basis of the eighth and ninth racketeering acts, each charging the conspiracy, attempt, and actual commission of a federal extortion offense.

[9] The attempted murder of DiMarco and the related obstruction of justice formed the basis for the fifth and sixth racketeering acts, charging the state offenses of solicitation, conspiracy, and attempted murder of DiMarco, and the federal offense of obstruction of justice.

Early in 1981, Rallo decided to cooperate with the government. In that capacity, he tape-recorded three discussions he had with Marino regarding the progress of the government's investigation. In the course of those discussions, Marino gave Rallo instructions about how to testify before the grand jury (Tr. 5938). The recordings of those discussions were played for the jury at trial (Tr. 5955, 5974, 5977).[10]

ARGUMENT

1. Petitioners Piccarreto and Marino renew their contention (85-1902 Pet. 6-13; 85-1949 Pet. 18-25)—previously raised and rejected by the court of appeals in an interlocutory appeal (85-1902 Pet. App. B1-B18)—that the Double Jeopardy Clause precluded the government from including the 1973 Massaro homicide as a racketeering predicate in this indictment. The Massaro homicide should not have been included, they argue, because that crime could have been charged as a predicate act in a 1976 racketeering indictment on which petitioners were acquitted. In rejecting this argument once before, the court of appeals held that the two indictments charged two distinct patterns of racketeering: the earlier indictment had charged an arson-for-insurance scheme, while the present one charged a pattern of extortion. 85-1902 Pet. App. B10-B16. The Massaro murder, the court of appeals noted, was charged "as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme*—a scheme which had no relationship to the 1976 arson-for-hire activity" (85-1902 Pet. App. B15-B16 (emphasis in original)). Be-

[10] The obstruction of justice with regard to Vincent Rallo formed the basis for the seventh racketeering act, charging the federal offense of obstruction of justice.

cause the two indictments could be separately prosecuted without offending the Double Jeopardy Clause, and because the Massaro murder was properly charged as part of the pattern of racketeering activity alleged in the second indictment, the government was not barred from including that offense as a predicate act in this case.

Following the court of appeals' earlier rejection of their double jeopardy claim, petitioners sought certiorari and made the same arguments they are making now. We argued in our brief in opposition to certiorari (Nos. 83-696 and 83-713) that the decision of the court of appeals was correct, and this Court denied review. In the present case, the court of appeals once again rejected petitioners' arguments (Pet. App. A16). Nothing has changed that would warrant further review of this issue at this time. We therefore rely on our previous submission in opposing this claim.[11]

2. Petitioners Marino and Rossi assert (85-1949 Pet. 3-8) that the definitional section of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961(1), incorporates state procedural provisions—in this case, the New York rule requiring that the testimony of accomplice witnesses be corroborated. Because the district court purportedly failed to require corroboration in this case, petitioners contend that the six predicate acts involving murder or attempted murder did not qualify as acts of "racketeering activity" within the meaning of Section 1961(1).[12] The court of appeals rejected that argu-

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[11] We are providing petitioners with copies of our brief in opposition in Nos. 83-696 and 83-713.

[12] It is well established that under federal law a conviction can properly rest on the uncorroborated testimony of an accomplice. See *Caminetti* v. *United States*, 242 U.S. 470, 495

ment, as has every other circuit that has considered it.

The courts of appeals have uniformly held that the reference in Section 1961(1) to crimes "chargeable under State law" is intended "simply to define the wrongful conduct, and not to incorporate state procedural law." *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). The courts have consistently refused to incorporate state procedural rules such as the requirement that accomplice testimony be corroborated, see *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); the law of merger, see *United States* v. *Licavoli*, 725 F.2d at 1046-1047; state speedy trial rules, see *United States* v. *Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979); and state statutes of limitations, see *United States* v. *Brown*, 555 F.2d at 418 n.22.[13] See generally *United States* v. *Nardello*, 393 U.S. 286 (1969) (reference in Travel Act to state "extortion" statutes encompasses any conduct that would generally be classified as ex-

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(1917); *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

[13] The same principle applies to other federal statutes that incorporate state criminal charges for definitional purposes. See *United States* v. *Steele*, 685 F.2d 793, 807 (3d Cir.), cert. denied, 459 U.S. 908 (1982) (18 U.S.C. 1952); *United States* v. *Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982) (18 U.S.C. 1952); *United States* v. *Cerone*, 452 F.2d 274, 286-287 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972) (18 U.S.C. 1952); *United States* v. *Corallo*, 413 F.2d 1306, 1322-1323 (2d Cir.), cert. denied, 396 U.S. 958 (1969) (18 U.S.C. 1952); *United States* v. *Revel*, 493 F.2d 1, 2-3 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (18 U.S.C. 1955).

tortionate, regardless of the label given to the conduct by state law).[14]

3. Petitioners Paone, Marino, and Rossi challenge (85-1892 Pet. 9-18; 85-1949 Pet. 15-18) the admission of certain co-conspirator declarations. They argue that under the Confrontation Clause a trial court may not admit co-conspirator declarations unless it first finds that they contain special "indicia of reliability." The short answer to this claim is that the court of appeals employed precisely the analysis urged by petitioners; the court simply reached a result with which petitioners disagree. Because petitioners have already had the benefit of the constitutional rule they propose, their claim reduces to the fact-bound contention that the court of appeals misapplied that rule in this case.

a. In rejecting petitioners' claim, the court of appeals based its analysis on the court's earlier decision

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[14] Petitioners' argument, taken to its logical limits, would significantly impair the effectiveness of the RICO statute. For example, New York grand jury law—in addition to the rule requiring corroboration of accomplices—prohibits the use of hearsay, see N.Y. Crim. Proc. Law § 190.30 (McKinney 1982), and the government's impeachment of witnesses it has called before the grand jury, see *People* v. *Fiore*, 112 Misc. 2d 45, 48, 445 N.Y.S.2d 960, 961-962 (Nassau County Ct. 1981). Every grand jury witness, moreover, is automatically entitled to immunity, see N.Y. Crim. Proc. Law § 190.40 (McKinney 1982), and the government may seek an indictment only where there is sufficient evidence to convict at trial, see *People* v. *Monroe*, 125 Misc. 2d 550, 480 N.Y.S.2d 259 (Sup. Ct. 1984). If, as petitioners suggest, the RICO statute adopts state procedural rules, the effectiveness and uniform application of the statute would be substantially undermined because of the wide assortment of applicable state procedural rules that would govern the conduct of federal grand jury and trial proceedings.

in *United States* v. *Puco*, 476 F.2d 1099, 1107 (2d Cir.), cert. denied, 414 U.S. 844 (1973). As in *Puco*, the court of appeals in this case held that when a co-conspirator's out-of-court statement is offered into evidence, the trial judge must determine whether the statement bears " 'sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination' " (Pet. App. A7 (quoting *Puco*, 476 F.2d at 1107)). The court further noted that it had previously recognized that " 'a higher standard of reliability is imposed if the hearsay statements are "crucial" to the Government's case.' " *Ibid.* (quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)). Nonetheless, the court observed, only rarely will a statement otherwise admissible under the hearsay rules fail to contain the indicia of reliability required by the Confrontation Clause. Because of the nature of the statements at issue in this case, the court held, no detailed reliability analysis was required (Pet. App. A7).

Contrary to petitioners' assertion, this Court's decision in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), does not require a different result. In *Roberts*, this Court rejected a Confrontation Clause challenge to the admission at trial of testimony that had been given at a preliminary hearing. The Court stated (448 U.S. at 65-66) that the Confrontation Clause requires that out-of-court statements offered at trial must ordinarily be shown to be reliable. Significantly, however, the Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66. Because the rule governing co-conspirator statements is just such a firmly rooted hearsay exception, we submit that *Roberts* supports the view that the Con-

frontation Clause does not require a separate inquiry into the reliability of statements that are found to satisfy the traditional co-conspirator declaration rule, see Fed. R. Evid. 801(d)(2)(E).[15]

To be sure, there is a conflict among the circuits on the question whether the Confrontation Clause requires a further "reliability review" beyond the reliability judgment assured by the requirements of Rule 801(d)(2)(E). Several circuits do not require a further examination of a statement's reliability, once that statement has been found to satisfy the co-conspirator declaration rule. See *United States* v. *Chindawongse*, 771 F.2d 840, 845-847 (4th Cir. 1985), cert. denied, No. 85-735 (Jan. 21, 1986); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Other courts, including the Second Circuit, require a separate reliability analysis under the Confrontation

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[15] Much of what this Court said about co-conspirator declarations in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), underscores this point. There, the Court refused to apply to co-conspirator statements a rule, applicable to prior testimony, requiring a preliminary determination of the declarant's unavailability. While expressly declining to decide whether trial courts must subject such statements to an independent reliability test (slip op. 4 n.3), the Court took special account of the "evidentiary significance of statements made when the conspiracy was operating in full force" (*id.* at 8). In light of these special features, the Court chose "to affirm the validity of the use of co-conspirator statements" and "decline[d] to require a showing of the declarant's unavailability as a prerequisite to their admission" (*id.* at 12-13).

Clause, even after the statements have passed muster under the rules of evidence. See, *e.g.*, *United States* v. *DeLuna*, 763 F.2d 897, 909-911 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Arbalaez*, 719 F.2d 1453, 1459-1460 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *United States* v. *Ammar*, 714 F.2d 238, 256-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983). As a practical matter, however, this difference in approach has proved to be of little significance: there apparently has never been a case in which a court of appeals has excluded a co-conspirator's statement under the Confrontation Clause after finding that the statement satisfied Rule 801(d)(2)(E). For that reason, the conflict among the circuits on this issue is not one that warrants this Court's attention. In any event, the Second Circuit is one of the courts that requires an independent reliability review under the Confrontation Clause. Petitioners had the benefit of the more generous standard in this case, so review by this Court is particularly inappropriate here.

b. Under the reliability analysis urged by petitioners—and applied by the court of appeals in this case—it is clear that the co-conspirator statements in this case were correctly admitted at trial. First, almost all the statements related to contemporaneous events. There was therefore no risk of inaccuracy stemming from faulty recollection on the part of the declarants. See *United States* v. *McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980); *United States* v. *Wright*, 588 F.2d 31, 37-39 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979).

Second, the statements were virtually all against the penal interest of the declarants. Again, this factor decreased the likelihood that the statements would be false or mistaken. See *United States* v. *Pagan*,

721 F.2d 24, 31 (2d Cir. 1983); *United States* v. *Perez*, 702 F.2d 33, 37 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

Third, contrary to Paone's assertion (85-1892 Pet. 14), the declarants in this case had no apparent motive to dissemble; most of the statements were made among the co-conspirators at a time when they knew each other to be members of the conspiracy. See *United States* v. *Mallah*, 503 F.2d 971, 980 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). Moreover, most of the statements were made while the declarants were reacting to, planning, or carrying out significant events in the operation of the enterprise. It was therefore most unlikely that the co-conspirators would have intentionally misreported those important events to their associates. See *United States* v. *DeLuna*, 763 F.2d at 910 & n.3; *United States* v. *Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir.), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Ammar*, 714 F.2d 256-257 & n.16; *United States* v. *Wright*, 588 F.2d at 37-38.[16]

Finally, the co-conspirators' declarations in this case were well corroborated by the testimony of the principal government witnesses and by other evidence.

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[16] In attacking the reliability of the co-conspirator declarations, Paone (85-1892 Pet. 4-8, 17-18) has erroneously focused on the motivations of the witnesses at trial to lie in recounting those declarations. The probity or lack of probity of the witnesses who reported the declarations, however, has little to do with the admissibility of the declarations themselves under the Confrontation Clause, since the trial witnesses were available to be cross-examined on the accuracy of their reports. It is the *declarants'* motivations that are important; and in this case there is no basis to believe that the declarants had any motivation to dissemble at the time they made the statements.

See *United States* v. *DeLuna*, 763 F.2d at 910-911; *United States* v. *Ammar*, 714 F.2d at 256-257; *United States* v. *Wright*, 588 F.2d at 38. The bulk of the government's case was based on the first-hand observations of witnesses Oliveri, Monachino, Pelusio, Rallo, and gambling club operator Thomas DiGiulio. Their testimony was extensively corroborated with respect to particular events by physical evidence and by police surveillance evidence.[17] In sum, because the court of appeals applied the same reliability test that is urged by petitioners, and because, after applying that test to the lengthy and complex factual record in this case, the court of appeals found the statements to be admissible, this issue does not warrant further review.

4. Petitioner Marotta contends (85-1883 Pet. 16-18) that he was denied his right to conflict-free counsel when the district court refused to grant him a severance or a continuance so that he could discharge

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[17] To the extent that Confrontation Clause analysis must also include consideration whether the statements are "crucial" to the prosecution or "devastating" to the defense (see *Dutton* v. *Evans*, 400 U.S. 74 (1970)), as petitioners also suggest (85-1892 Pet. 18-21; 85-1949 Pet. 17-18), the statements in this case were neither. The co-conspirator declarations did fill in certain details about which the government witnesses did not have first-hand knowledge. But because of the substantial additional evidence inculpating the defendants, and the extensive corroboration of the testimony of the principal witnesses, the co-conspirator declarations played a relatively limited independent role in inculpating the defendants. See *United States* v. *Perez*, 658 F.2d at 662. The court of appeals was therefore correct in concluding that this was not a case calling for the application of the Second Circuit rule that imposes a higher standard of reliability when the hearsay statements are "crucial" to the government's case (Pet. App. A7, quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)).

his attorney and substitute new counsel during the trial. Building on this claim, petitioners Marino and Rossi assert (85-1949 Pet. 11-13) that the other defendants were prejudiced by the continued involvement of Marotta's lawyer in the case. These arguments are meritless.

a. During his cross-examination, government witness Angelo Monachino disclosed that when he was arrested in 1975 on unrelated charges, attorney Richard Miller, who represented Marotta in this trial, had sought to obtain bail for him. At a bench conference, Miller explained that he had shared an office with Monachino's lawyer at that time, and that on several occasions between February and June 1975 he had assisted Monachino's lawyer in representing Monachino on the pending charges, all of which were unrelated to the charges involved in this case. Miller added that he had not represented Monachino on any matter since 1975 (Tr. 1000-1002).

At that point, Marotta requested that Miller be discharged as his attorney, and he asked for permission to retain new counsel (Tr. 1018). The court then held a lengthy colloquy with Monachino, in which Monachino agreed to waive his attorney-client privilege with regard to any disclosures he may have made to Miller in the course of that representation (Tr. 1038-1052; see also Tr. 1112-1113). Following that colloquy, the district court declined to grant Miller leave to withdraw from the case.

The court of appeals correctly held that the district court's action did not abridge Marotta's Sixth Amendment rights. First, the court noted that a criminal defendant does not have an unfettered right to substitute new counsel, particularly after trial has commenced, when such a step will require a severance, a

delay in the trial, or some other disruption in the proceeding. See *United States ex rel. Spurlark* v. *Wolff*, 683 F.2d 216, 219-220 (7th Cir. 1982); *McKee* v. *Harris*, 649 F.2d 927, 931 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982); *United States* v. *Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973). Certain restraints must be placed on the reassignment of counsel lest the right be " 'manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' " *McKee* v. *Harris*, 649 F.2d at 931 (quoting *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), cert. denied, 375 U.S. 940 (1963)). In this case, to have permitted Marotta to change counsel would have required either a lengthy postponement in the trial or, more likely, a severance and a separate trial for Marotta alone. In these circumstances, it was perfectly proper for the court to deny the request for substitution of counsel.

Moreover, as the court of appeals correctly held, Miller's purported conflict of interest was highly attenuated. Miller's representation of Monachino had occurred ten years earlier, it was extremely limited in nature, and it was unrelated to any of the present charges. In addition, Monachino expressly waived any attorney-client privilege he had, which authorized Miller to use, on Marotta's behalf, any information he may have secured during the prior representation. Under these circumstances, Marotta could not have been prejudiced by Miller's prior representation of Monachino. See *United States* v. *Agosto*, 675 F.2d 965, 972 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Shepard*, 675 F.2d 977, 980 (8th Cir. 1982); *Theodore* v. *New Hampshire*, 614 F.2d 817 (1st Cir. 1980); *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied,

446 U.S. 964 (1980); *United States* v. *Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); see generally *United States* v. *Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982) ("we are aware of [no case] in which an attorney has been disqualified on grounds of conflicting prior representation solely at the behest of a person other than the former client or its privy"), cert. denied, 466 U.S. 951 (1984). Finally, the district court carefully informed the jury of the insubstantial nature of the prior representation and advised the jurors that they were to draw no adverse inferences from that representation (Pet. App. A10; Tr. 1114-1116). The court of appeals correctly concluded that in view of the detailed instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any showing of prejudice to Marotta,[18] no substitution of counsel was necessary.[19]

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[18] Marotta complains (85-1883 Pet. 12-15) that as a result of his inability to obtain substitute counsel, he was unfairly bound by the stipulations entered into by other counsel, to which he did not agree. That is incorrect. In fact, Marotta signed certain of the stipulations and declined to sign others. The court repeatedly acknowledged that Marotta would not be bound by the stipulations that he did not sign, and it so instructed the jury (Tr. 5332, 5596, 6509-6512, 6530-6535).

[19] Petitioner's claim (85-1883 Pet. 16) of a conflict among the circuits on this issue is insubstantial. Petitioner relies on *Walberg* v. *Israel*, 766 F.2d 1071 (7th Cir. 1985), cert. denied, No. 85-331 (Dec. 12, 1985) and *Wilson* v. *Mintzes*, 733 F.2d 424 (6th Cir.), vacated, 469 U.S. 926 (1984), on remand, 761 F.2d 275 (6th Cir. 1985), in which the courts ruled that substitution of counsel should have been allowed. Those cases, however, are readily distinguishable. In *Walberg* the court of appeals granted relief because it concluded that the trial court's hostility to defense counsel had denied the defendant a fair trial. In *Wilson*, the court of appeals likewise concluded that the trial judge's antagonism toward defense

b. Petitioners Marino and Rossi argue (85-1949 Pet. 11-13) that the remaining defendants were prejudiced by Miller's continued representation of Marotta at trial. They reason that Miller's previous representation of Monachino, coupled with his ongoing representation of Marotta, bolstered in the minds of the jurors the government's theory "that an organization/enterprise existed * * * and that one of its objectives was to subvert law enforcement efforts by supplying legal assistance to its alleged members" (85-1949 Pet. 12). This is a most speculative inference to draw; certainly nothing in the one line of testimony about Miller's prior representation of Monachino suggested that Miller had been hired to represent Monachino by the "enterprise"—much less that Miller was subsequently reassigned to Marotta in some sort of "mob legal services" arrangement (*ibid.*). Indeed, in the setting in which the Miller episode arose, it is particularly unlikely that the jury drew any parallel between that episode and the two instances in which members of the enterprise had obtained legal assistance for others. The testimony about those two instances came much later in the trial and involved defendants other than Marotta. Moreover, the court's curative instruction put to rest any possible adverse inference the jury might have drawn from the Miller episode; the court carefully explained to the jury that Miller was simply accommodating an attorney with whom he shared office space when he represented Monachino, that he performed a relatively minor service, and that such an accommodation is not at all uncommon among criminal defense lawyers (Tr. 1114-1115).

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counsel, which included suggestions that counsel was incompetent, resulted in real prejudice to the presentation of a defense.

5. Petitioner Marino claims (85-1949 Pet. 14-15) that he was denied a fair trial when the court did not permit him to call Marotta's lawyer as a defense witness. The court of appeals correctly found that this argument was without merit (Pet. App. A16).

One morning late in the trial, counsel for Marino announced to the court that he had just learned from Marotta's attorney, Richard Miller, that Miller had been present at a gathering at Marino's home on the day of Gingello's funeral (Tr. 4052). Marino's counsel said that Miller would testify that the event was a quiet and entirely innocuous after-funeral affair, and not a meeting to plan revenge against the rival faction for the murder of Gingello. The trial court noted that if counsel wished to establish that point, Miller was not an essential witness, because there were many other persons present at that gathering who could testify on the point (Tr. 4053).[20] After a formal proffer was made at the close of the defense case, the district court ruled that because Miller was an attorney for a party in the case, it would be improper for him to appear as a defense witness (Tr. 6876).

It is well settled that a district court should not permit an attorney for a party to testify as a witness absent compelling reasons or extraordinary circumstances. See *United States* v. *Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); *United States* v. *Johnston*,

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[20] Contrary to petitioner's contention, there was no suggestion by the government at trial that the post-funeral gathering at Marino's house was anything but an innocuous post-funeral affair, as Miller would have testified. The government's evidence was that the critical meeting among the co-conspirators, at which they planned the campaign of revenge against Didio's faction, occurred at Rossi's apartment several days later (see Tr. 2766-2770, 3488, 3519-3523, 3552-3553).

690 F.2d 638, 644 (7th Cir. 1982); *United States* v. *Bates*, 600 F.2d 505, 510-511 (5th Cir. 1979); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); *United States* v. *Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974). Only if the proposed testimony is important, and there is no other way to present that evidence, is it appropriate to permit a participating lawyer to testify. *United States* v. *Bates*, *supra*; *United States* v. *Nyman*, 649 F.2d 208, 211 (4th Cir. 1980). Here, the court of appeals, with the entire record before it, concluded that the minimal value of Miller's prospective testimony did not warrant departing from the traditional proscription against testimony by a party's attorney. That decision was plainly correct: the post-funeral gathering at Marino's home was apparently a well-attended affair, and there were presumably other persons who could have testified about the nature of the affair, to the extent that that evidence was relevant at all.

6. Petitioners Russotti, Piccarreto, Marino, and Rossi contend (85-1901 Pet. 6-9; 85-1902 Pet. 16-19; 85-1949 Pet. 8-10) that the district court erred when it failed to admit the recorded testimony of two of the defendants from prior state proceedings. The defendants had offered testimony given by Colombo before a state grand jury and testimony given by Piccarreto in a state criminal trial. They argued that, although the prior testimony was hearsay as to the two declarants, it was admissible on behalf of the other defendants, under Fed. R. Evid. 804(b)(1), as the former testimony of an unavailable declarant. The district court refused to admit the prior testimony because the United States had not been a party to the state proceedings, and thus, as "the party against whom the testimony is now offered," the

United States did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). See *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, No. 84-971 (Apr. 15, 1985); *United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982); *United States* v. *Atkins*, 618 F.2d 366, 372-373 (5th Cir. 1980); see also D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1102 n.3 (1980).

Recognizing that Rule 804(b)(1) does not allow the admission of this proffered evidence, petitioners maintain that the rule is unconstitutional as applied. In making this argument, petitioners rely principally on this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *Chambers*, however, is readily distinguishable from this case. In *Chambers*, the defendant was prevented by state hearsay rules from introducing several statements made by a person who confessed to the very crime for which the defendant was on trial. The statements were thus directly exculpatory of the defendant, amounting to evidence "critical to Chambers' defense" (410 U.S. at 302). Moreover, the statements had considerable assurances of reliability: they were corroborated by other evidence; they were quite clearly against the penal interest of the declarant; and the declarant was in fact available for cross-examination (410 U.S. at 300-301).

Here, by contrast, the proffered testimony consisted of little more than bare self-serving denials of culpability by Piccarreto and Colombo (see Piccarreto App. 507-528, 6263-6264).[21] Piccarreto simply denied having been personally involved in the Massaro mur-

[21] "Piccarreto App." refers to the appendix to Piccarreto's brief in the court of appeals.

der plot; his testimony did nothing to exculpate the other defendants. Similarly, in his state grand jury testimony, Colombo simply denied that he and Oliveri had attempted to murder DiMarco. Thus, Colombo's testimony exculpated Colombo—who clearly was precluded from offering his own prior testimony—but it did nothing to exculpate the remaining defendants. Finally, in the prior state proceedings, both defendants were testifying under circumstances giving them a powerful motivation to lie.

Thus, the proffered testimony in this case was not critical to the defense, nor did it possess any of the assurances of reliability that characterized the evidence in *Chambers*. This would therefore be a highly unsuitable case in which to consider, as petitioners urge, whether to fashion a novel constitutional exception to Rule 804(b)(1).

7. Finally, petitioners Marino and Rossi contend (85-1949 Pet. 25-27) that the court of appeals erred in permitting consecutive sentences for their convictions under the RICO substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). That contention flies in the face of this Court's analysis of closely analogous statutory schemes as well as the rule adopted in the great majority of circuits.

This Court has long held that it is permissible to impose consecutive sentences for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit cumulative punishment. In *Albernaz* v. *United States*, 450 U.S. 333

(1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).

Applying the same analysis, the courts of appeals that have considered the issue have noted that RICO substantive and conspiracy provisions require proof of separate elements; they have therefore almost uniformly concluded that the two provisions permit consecutive punishments. *United States* v. *Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Marrone*, 746 F.2d 957, 959 (3d Cir. 1984); *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d 564, 570-571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). The only exception is the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001, 1040 (en banc), cert. denied, 453 U.S. 912 (1981). In *Sutton*, the court held that because the same evidence at trial supported both the

RICO substantive and conspiracy convictions, the convictions merged for purposes of sentencing. As later cases have pointed out, however, the *Sutton* court overlooked the fact that the *Blockburger* test focuses not on the evidence adduced at trial, but on the elements of the crimes charged. *United States* v. *Davis*, No. 85-2473 (10th Cir. June 9, 1986), slip op. 6-8; *United States* v. *Watchmaker*, 761 F.2d at 1477; *United States* v. *Marrone*, 746 F.2d at 959. As long as the elements of the two crimes are different, there is no constitutional impediment to imposing cumulative punishments for conduct that violates both statutory provisions—even if the same proof at trial supported both convictions.

Although there is a conflict among the circuits on this issue, it is not one that requires resolution by this Court. The *Sutton* case was decided before this Court's decision in *Albernaz* and before most of the circuit court decisions that have rejected *Sutton*'s analysis of the consecutive sentencing issue. In light of these subsequent developments we believe that when the Sixth Circuit once again squarely confronts the issue, it is highly likely that that court will conclude that consecutive sentences are permissible under 18 U.S.C. 1962(c) and (d).[22]

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[22] In *United States* v. *Qaoud*, 777 F.2d 1105, 1118 (1985), the Sixth Circuit referred to its previous decision in *Sutton*, but it did not have occasion to revisit the merits of the consecutive sentencing issue.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 85-1892, 85-1901, 85-1902 and 85-1949

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD J. MARINO AND JOSEPH R. ROSSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

The seventh question presented in this case is whether consecutive sentences may be imposed for convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO) substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). Petitioners Marino and Rossi (85-1949 Pet. 25-27) ask the Court to review that question,

relying on a conflict between the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001 (1980) (en banc), cert. denied, 453 U.S. 912 (1981)—holding that consecutive sentences may not be imposed—and the uniformly contrary decisions of the other courts of appeals. The Sixth Circuit in *Sutton* reasoned that because the same evidence at trial supported both the RICO substantive and conspiracy convictions, the convictions must be merged for purposes of sentencing. In our brief in opposition in this case (Br. 25-27), we contended that the Court need not resolve the conflict among the circuits on this question. We observed (Br. 27) that, in light of subsequent developments, the Sixth Circuit might reconsider its decision in the *Sutton* case.*

On January 23, 1987, the Sixth Circuit decided *United States* v. *Callanan*, No. 86-1140, in which the court abandoned the rationale of its decision in the *Sutton* case. In *Callanan* the court of appeals held that concurrent sentences may be imposed for convictions under the RICO substantive and conspiracy provisions. The court observed (slip op. 2) that this question turns on whether "Congress intended a defendant's conduct to be punishable under both provisions." Consistent with the analysis applied by all of the other circuits that have addressed the issue (see Br. 26), the court of appeals first considered (slip op. 2-3) whether, under this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the substantive and conspiracy offenses each required proof of a fact that the other did not. The court answered this question affirmatively (slip op. 3). The court next reviewed (*id.* at 3-6) the legislative history of the RICO provisions, discerning in that history "Congress'

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*Our opening brief in opposition in this case also responded to the petition of Thomas E. Marotta, No. 85-1883. On October 14, 1986, the Court denied certiorari as to petitioner Marotta. We have, accordingly, deleted his name from the caption in this brief.

intent to allow punishment under both §§ 1962(c) and 1962(d)" (*id.* at 5). The court expressly rejected (*id.* at 6-7) the argument—crucial to its earlier holding in *Sutton*—that because the proof at the trial in this case had been the same for both offenses, there could not be separate punishments. "[T]he relevant inquiry," the court held (*ibid.*), "examines the proof necessary to establish the statutory elements."

To be sure, the *Callanan* case by its terms resolved only the availability of *concurrent* sentences for RICO conspiracy and substantive convictions. But in deciding that question the court of appeals made clear that its reasoning applies equally to the question of consecutive sentences. The court cited (slip op. 4-5) *United States* v. *Sutton*, 700 F.2d 1078 (6th Cir. 1983) (*Sutton II*), and *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), for the proposition that consecutive sentences may be imposed for a RICO charge and a predicate offense. The court concluded (slip op. 5) that under its analysis in the present case "Congress' express purposes in enacting RICO suggest the same conclusion * * * concerning conspiracy to violate and actual violation of RICO proscriptions."

The *Callanan* case thus represents a rejection of *Sutton* by the Sixth Circuit, in favor of the contrary analysis applied by the other courts of appeals. Accordingly, there is no longer any real conflict among the circuits on the seventh question presented.

For the reasons set forth in this supplemental brief and in our main brief in opposition, the petitions for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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Nos. 85-1892, 85-1901, 85-1902, 85-1949

In The

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RENE PICCARRETO,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER, RENE PICCARRETO

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SUPPLEMENTAL BRIEF
FOR THE PETITIONER,
RENE PICCARRETO

The first and second questions presented in this petition concern the validity of traditional 'double jeopardy' analysis when applied to successive RICO prosecutions.

In 1976 the petitioner was indicted for being a member of an enterprise, i.e. the "Rochester mob". The underlying predicate acts in the 1976 indictment included several arsons that were allegedly part of an insurance fraud scheme. As set forth in the petition, a person named Massaro was a prime mover in this scheme. Later, Massaro was murdered. The two informants who provided the information on this alleged scheme also provided information as to the causes and participants in the murder of Massaro. These two claimed that the same enterprise that ran the insurance/fraud scheme ordered the killing of Massaro because he was talking about the insurance/fraud scheme. It was also alleged that the petitioner was involved. For reasons known only to the authorities, the Massaro murder was not included as a predicate act in the 1976 RICO indictment.

The petitioner was tried and acquitted on the 1976 indictment.

In 1982, the petitioner was charged with a second RICO indictment. Most of the underlying predicate acts in the indictment involved new charges (post 1978) concerning the alleged competition between rival forces for control of the illegal gambling business in the Rochester area. However, also included as an underlying predicate act, was the 1973 murder of the aforementioned Massaro.

The petitioner sought to have this part of the 1982 indictment expunged on grounds of double jeopardy. The petitioner argued

that the second prosecution should have been barred from using the Massaro homicide as a predicate act since the government knew of the allegations at the time of the return of the 1976 indictment. Since the charges could have been included in the 1976 RICO indictment, but weren't, the acquittal on the 1976 RICO should have acted as a bar to that part of the 1982 indictment which included any predicate acts that were known to the government at that time and were related to the affairs of the enterprise. This rule would prevent the government from 'holding back' predicate acts, so as to bring multiple RICO charges against a defendant who is acquitted after trial on the first indictment (see petition).

In an interlocutory opinion, *United States v. Russotti,* 717 F.2d 27 (CA2 1983), the Second Circuit rejected the defense argument and held that the 1982 RICO indictment presented no double jeopardy problems for the prosecution. The basis for the rejection was the court's acceptance of the government's representation, without the benefit of a hearing, that two separate schemes were involved: one, the insurance/fraud scheme; and the other, the gambling club/extortion scheme. The government stated that the **"two schemes were totally unrelated, and therefore, the government could not have included the charges in the first indictment even if they wanted to."** The Court accepted this argument but issued a warning:

> "we are not insensitive to the appellants' concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts . . . and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise . . . However, the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its extortion scheme — **a scheme which had no relationship to the 1976 arson-for-hire activity."** *Russotti,* supra at 34.

In other words, the court construed the pattern requirement of RICO in a conservative fashion. Although the predicate acts were committed by the same enterprise and were related to the affairs of that enterprise, the court held that the acts were not related enough to have included them in the same RICO indictment.

The purpose of this supplemental brief is to bring to this Court's attention a recent Second Circuit case that contradicts the *Russotti* holding. In *United States v. Ianniello,* 808 F.2d 184 (CA2 Dec. 1986), the Second Circuit held that the RICO pattern element does not require anything more than two racketeering acts. The acts need not be related by a common scheme and need not involve more than one transaction, id. at 190-192. In so holding, the court reaffirmed the theory set forth in *United States v. Weisman,* 624 F.2d 1118 (CA2 1980) that any concern for relatedness and continuity is supplied by the enterprise element and the nexus of the racketeering acts to the enterprise: "we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied." *Ianniello,* supra at 192.

CONCLUSION

Clearly, the 1973 Massaro homicide could have been included in the 1976 RICO indictment. If this is true then the court's rationale for its interlocutory holding is fatally flawed. When the government is aware of underlying predicate acts, it has the choice of picking and choosing which acts to include. Once the choice is made, however, the government may not then bring successive RICO prosecutions following an acquittal, based on acts

that could have been included in the first indictment. To do so violates the Fifth Amendment principles of double jeopardy and fundamental fairness.

The holding in *Ianniello* contradicts the rationale of the interlocutory holding in *Rossotti.* In addition, footnote 14 in the *Sedima* opinion (*Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 US-, 87 L.Ed. 2d 346, 358, 105 S.Ct. - (1985)) leaves the law concerning a RICO 'pattern of racketeering activities' unclear. Because of the expected continuation of RICO indictments, the petition for a writ of certiorari should be granted to provide guidance to the trial courts on the 'pattern' requirements of RICO and to correct the violation of Fifth Amendment rights suffered by this petitioner.

DATED: April 30, 1987

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